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Supreme Court, U.S.

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No.

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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., *et al.*

Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

EARL W. KINTER
DONALD M. BARNES
DENNIS C. CUNEO
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Ave. N.W.
Washington, D.C. 20036-5339
(202) 857-6044

MILTON HANDLER
STANLEY D. ROBINSON
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

GUY FARMER
(Counsel of Record)
FARMER, MCGUINN, FLOOD,
BECHTEL & WARD
1000 Potomac Street, N.W.
Suite 402
Washington, D.C. 20007
(202) 298-6910
SHALE D. STILLER
PETER H. GUNST
FRANK, BERNSTEIN, CONAWAY
& GOLDMAN
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 547-0500

*Attorneys for Petitioners National Electrical Contractors Association,
Robert L. Higgins and H.E. Autrey and Other Individuals Sued In Their
Individual Capacities and as Trustees of The National Electrical Industry
Fund; Colgan Electric Company, Inc. and Miller Electric Company
January 7, 1983*

QUESTION PRESENTED

This petition presents a question of paramount importance to the continued existence of thousands of industry funds throughout the construction industry. In an unprecedented expansion of the antitrust laws, the Fourth Circuit condemned an industry fund provision contained within a valid collective bargaining agreement as illegal *per se* price fixing, thereby threatening a major industrial union and a national employers' association with massive treble damage liability estimated by class counsel to exceed one hundred twenty million dollars (Appendix, pp. 171a-172a, at p. 172a).

The precise question presented for review is:

DID THE INCLUSION OF AN INDUSTRY FUND PROVISION IN A COLLECTIVE BARGAINING AGREEMENT CONSTITUTE ILLEGAL *PER SE* PRICE FIXING, WHERE THE EMPLOYERS' PAYMENTS WERE USED TO BENEFIT THE ENTIRE ELECTRICAL CONTRACTING INDUSTRY, AND THERE WAS NO FINDING THAT ANY EMPLOYER WAS EVER FORCED TO PAY INTO THE FUND, OR THAT IT AFFECTED THE PRICE OF ELECTRICAL CONSTRUCTION CONTRACTS?

PARTIES TO THIS PROCEEDING

The Petitioners in this case are National Electrical Contractors Association, Inc., Robert L. Higgins, The International Brotherhood of Electrical Workers, AFL-CIO, Charles H. Pillard, Colgan Electric, Inc., Miller Electric Co., and H.E. Autrey, Allen L. Bader, Frank H. Bertke, Donald C. Cates, Robert W. Colgan, Joe R. Devish, and Carl T. Hinote in their individual capacities and as Trustees of the National Electrical Industry Fund, and Allan H. Stroupe, L.R. McCord, Aldo P. Lero and Lowell C. Timm, in their official capacities as Trustees of the National Electrical Industry Fund, and John Ostrow, C.W. Stroupe, Warren Losh and J.D. Hilburn, Sr., in their individual capacities.

The Respondents in this case are National Constructors Association and Commonwealth Electric Company, by and on behalf of itself and all others similarly situated and The Howard P. Foley Company, by and on behalf of itself and all others similarly situated, and Donovan Construction Company of Minnesota, Inc., Arthur McKee & Company, Inc., Badger America, Inc., Catalytic, Inc., C.F. Braun Constructors, Inc., Dravo Corporation, Guy F. Atkinson Company, The H.K. Ferguson Company, Jacobs Constructors, Inc., Pullman Kellogg, Division of Pullman, Inc., and Stearns-Roger, Inc.

CORPORATE LISTING STATEMENT

National Electrical Contractors Association, Inc. (NECA) is a non-profit trade association with autonomous chapters representing electrical contractor members in collective bargaining with the International Brotherhood of Electrical Workers, AFL-CIO. It is a non-stock corporation and has no parent company, subsidiaries, or affiliates.

The members of NECA which are publicly owned corporations as well as their subsidiaries which are also NECA members are as follows:

1. Fischbach Corporation

Fischbach & Moore Electrical Construction, Inc.
 Baldwin-Stewart Electric
 Corbin-Dykes Electric
 County Electrical Co.
 T.H. Greene Electric Co.
 Tramco, Inc.
 A.S. Schulman Electric Co.
 W.V. Pangborne & Co.
 Buffalo Electric Construction
 Beach Electric Co.
 W.A. Chester
 Power Systems
 Watson-Flagg Electric Co., Inc.
 W.W. Clark Corp.
 John Miller Electric Co.
 Day & Zimmerman
 F & M Automation
 Electronic System
 Fischbach Boulos
 Deever Electric
 Beacon Elec. Engr.
 J.P. Miller
 Fuel Economy

2. The L.E. Myers Co., Inc.

Hoosier Engineering
 Keith Electrical Co., Inc.
 Grissom & Johnson, Inc.
 Interstate Electric

3. E.C. Ernst Co., Inc.

4. Dynalectron

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**PETITION FOR A WRIT OF CERTIORARI TO
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The petitioners, the National Electrical Contractors Association, Robert L. Higgins, H.E. Autrey, Robert W. Colgan, the trustees of the National Electrical Industry Fund, Colgan Electric, and Miller Electric respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 17, 1982.

I.

OPINIONS BELOW

The majority and dissenting opinions filed by the United States Court of Appeals for the Fourth Circuit are reported at 678 F.2d 492 (4th Cir. 1982), and appear in the Appendix hereto at pp. 1a-22a. The decision of the U.S. District Court for the District of Maryland is reported at

498 F.Supp. 510 (D.Md. 1980), and appears in the Appendix at pp. 23a-97a. The District Court's injunction was entered on October 8, 1980, and appears in the Appendix at pp. 98a-99a. The Fourth Circuit's Order of September 8, 1982, denying Petitioners' Motion for Rehearing appears in the Appendix at pp. 100a-101a.

II.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 17, 1982, by a 2-1 vote. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied September 8, 1982. Petitioners' application for an extension of time within which to file its Petition for a Writ of Certiorari was granted by Chief Justice Warren E. Burger on November 29, 1982, extending our time to and including January 7, 1983 (see Appendix at p. 102a). This Petition is timely filed with this Court under the provisions of 28 U.S.C. § 2101(c). The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The co-defendants below, the International Brotherhood of Electrical Workers and Charles Pillard, are also filing a petition for a writ of certiorari.

III.

STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Sherman Act, Section 1, 15 U.S.C. Sec. 1;
2. Clayton Act, Section 4, 15 U.S.C. Sec. 15;
3. Clayton Act, Section 6, 15 U.S.C. Sec. 17;
4. Clayton Act, Section 16, 15 U.S.C. Sec. 26;
5. Clayton Act, Section 20, 29 U.S.C. Sec. 52;
6. Norris-LaGuardia Act, Sections 1, 2, 5, 6, 13, 29 U.S.C. §§ 101, 102, 105, 106, 113.

7. Labor Management Relations Act, as amended, Sections 8(a)(5), 8(b)(3), 8(d), 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d).

Pertinent portions of these statutory provisions are reproduced in the Appendix at pp. 103a-113a; 193a.

IV.

STATEMENT OF THE CASE

A.

Preliminary Statement

This is a class action antitrust suit brought by the National Constructors Association and several contracting companies against the International Brotherhood of Electrical Workers, the National Electrical Contractors Association, and certain individuals and NECA member companies. Although conceding that this was a "case of first impression," a divided Fourth Circuit panel affirmed the district court's grant of summary judgment for plaintiffs, holding that an agreement between the IBEW and NECA to include an industry fund in a *bona fide* collective bargaining agreement constitutes illegal *per se* price fixing.

B.

1. The Adoption Of The Industry Fund

NECA is a national trade association of union and non-union electrical contractors with 135 local chapters throughout the country. The IBEW is an international union consisting of more than one million trained electricians and apprentices, representing the vast majority of the nation's union electrical construction workers. For decades NECA and the IBEW have provided a stable collective bargaining structure for the negotiation of wages, hours and working conditions throughout the union electrical construction industry.

In 1976, the IBEW, which for years had sought to improve its members' pension fund financed by contributions from union electrical contractors, negotiated a National Collective Bargaining Agreement with NECA (Appendix, pp. 173a-177a), the provisions of which were included in all local collective bargaining agreements negotiated between IBEW local unions and NECA chapters. The employers agreed to increase their pension fund contributions from 1% to 3% of gross labor payroll. In return, NECA secured significant cost saving concessions which benefitted NECA and non-NECA contractors alike. These provisions were: (1) a clause which substantially reduced the overtime rates paid to employees working on second and third shifts; (2) a higher apprenticeship ratio which permitted employers to hire more apprentices at rates significantly lower than the wages paid journeymen electricians, and (3) a long sought management rights provision. NECA and the IBEW also agreed to the National Electrical Industry Fund (the Fund).

Typically, non-NECA contractors either (a) voluntarily authorize the local NECA chapter to act as their collective bargaining agent, or (b) simply await the outcome of IBEW-NECA contract negotiations and then voluntarily adopt the terms and conditions of the local agreement. (The standard form letters of assent A and B appear in the Appendix, pp. 169a and 170a.) By pursuing either course, non-NECA contractors may obtain union labor in any locality in which they choose to compete for electrical contracting work. Thus non-NECA contractors are enabled to bid on projects far from their local service areas with advance knowledge of what their labor costs will be.

Employers who voluntarily adopted collective bargaining agreements which contained the industry fund provision agreed to contribute between .2% and 1% of their

gross labor payroll to the Fund, .2% of which was received by national NECA and the balance, if any, by the various local NECA chapters. Fund collections are placed in trust and used to pay, *inter alia*, the contractor's cost of (1) negotiating and implementing local and national collective bargaining agreements, (2) maintaining a national industry arbitration system, (3) implementing employee training programs, (4) improving industry and governmental codes and specifications, (5) increasing industry advertising, and (6) financing NECA's industrywide labor relations services.¹

The Fund is not novel. Industry funds have long been commonplace throughout the construction industry. The *Engineering News Record* (Appendix, pp. 114a-120a, at 118a) reported in July 1980 that 48.9% of the 2,907 collective bargaining contracts monitored by the Construction Labor Research Council included industry fund provisions. Similarly, 33.7% of the approximately 5,000 labor contracts examined by the Department of Labor's Office of Construction Industry Services included fund provisions. Even before the Fund was established, approximately 92 IBEW-NECA local collective bargaining agreements provided for local industry funds.

The Fund was intended as something more than a mechanism through which NECA and non-NECA contractors could pay their fair share of the expenses of negotiating and administering industry collective bargaining agreements and other similar services. It was

¹ The Fund can be used only to finance the industrywide services expressly designated in its Declaration of Trust (Appendix, pp. 178a-181a). A Board of Trustees was established to ensure that the conditions of the Trust were strictly observed. There has been no finding that Fund money was ever expended for any purpose inconsistent with the purposes set forth in the Trust document.

also intended to increase the funds available to improve the quantity and quality of the services which NECA provided the entire electrical construction industry. Thus, for example, it enabled NECA to increase the number of its trained field representatives, so that management could match the union's ability to provide expert labor personnel to resolve local labor-management disputes.

Non-NECA contractors are not compelled to accept the benefits of the local IBEW-NECA agreement.² They remain free to negotiate their own independent labor agreements with the union, without any industry fund obligation. And, as the record in this case demonstrates, non-NECA contractors have in fact negotiated individually and collectively with the IBEW for independent agreements which do not include the Fund provision. Thus, if a non-NECA contractor chooses to adopt the terms of a NECA labor agreement—including the Fund—rather than negotiate independently with the union, it is in every sense a voluntary election on his part.

2. How The Fund Benefits Non-NECA Contractors

NECA and the IBEW have for decades provided an effective collective bargaining structure which benefits the entire electrical construction industry. Local NECA

² While the courts below found that the parties *agreed* to "insert" the Fund provision in bargaining agreements negotiated between the IBEW and non-NECA contractors, as well as in NECA agreements, they did not find that any contractor was *in fact* compelled to accept the Fund provision (498 F.Supp. at 536-37, 678 F.2d at 501-02; Appendix, pp. 68a-69a and 15a-16a). Indeed, petitioners demonstrated below that the IBEW entered into numerous agreements with non-NECA contractors, including plaintiffs, which excluded the Fund provision altogether (Appendix, pp. 182a-187a).

chapters act as multiemployer bargaining agents in negotiating collective bargaining agreements with IBEW local unions, which are made available for voluntary adoption by non-NECA contractors. The negotiation and administration of such agreements is a long and involved process, the cost of which is borne by the Fund.

NECA maintains a staff of professional labor representatives who are available in the field to assist union contractors and aid in the resolution of employer-employee disputes on the job site. If a problem cannot be settled on the site, it may be referred to the local Labor-Management Committee which is staffed by NECA chapter members and IBEW local representatives. These committees, provided for in the local IBEW-NECA agreement, are utilized to resolve disputes which arise under the local agreement. The vast majority of local agreements further provide that determinations reached by the local Labor-Management Committee may be appealed to the Council on Industrial Relations for final, binding resolution.

Established in 1921 by the IBEW and NECA, the Council, which is composed of equal numbers of NECA and IBEW members, has consistently resolved industry labor disputes by private adjudication without the intervention of third party arbitration—an accomplishment expressly recognized as a unique and progressive step in the peaceful settlement of labor disputes.³ The Council is

³ "The most successful arrangement for the adjudication of contract disputes has been the agreement negotiated between the International Brotherhood of Electrical Workers and the National Electrical Contractors Association. Since 1921, the electrical industry's Council on Industrial Relations has rendered private judicial

the principal reason why electrical contracting, alone among the construction trades, has been termed a virtually strike-free industry. *See Parks v. IBEW*, 314 F.2d 886, 894 (4th Cir. 1963), *cert. denied*, 372 U.S. 976 (1963).

The IBEW and NECA also undertake the selection and training of apprentices throughout the electrical construction industry. NECA contractors and IBEW members, sitting in joint committee, screen and interview tens of thousands of applicants annually. Once selected, the apprentices are enrolled in the Joint Apprenticeship Training Program, developed and managed by NECA and the IBEW. Additionally, NECA provides extensive employer training activities, research studies (such as compiling the National Electrical Code), and other related services.

The benefits to the non-NECA contractor stemming from voluntary assumption of local IBEW-NECA agreements are immense. The non-NECA contractor saves the time and cost of negotiating his own agreement and assures himself of the right to obtain skilled labor on an equal basis with local contractors. By adopting the local agreement already in place he can immediately compute his labor costs, thus expediting his bid presentation. He also obtains immediate access to a pool of skilled electricians, trained through the efforts of local NECA con-

determinations on a variety of disputed matters including wage-rate determinations. While it has no mandatory powers to enforce compliance, its record is unique; never in the more than 48 years of the Council's existence has a decision been violated. Its success, however, is the product of many years of experience and may not be readily duplicated in other branches of the industry." *Work Stoppages in Contract Construction, 1962-73* at 15, a study published by the Department of Labor.

tractors and the union. Without access to this labor pool the large travelling contractor could not secure the skilled labor he requires to compete in the local market.

The extensive industry services financed through voluntary Fund contributions are also of great value to the non-NECA contractor. As *Williams v. ITT Grinnell Industrial Piping, Inc.*⁴ recognized, each contractor who voluntarily adopted this Fund "stood to benefit from [Fund] activities even though it was not [a] NECA member." The court concluded:

The Declaration of Trust limits the fund's use of employer contributions to specific activities. NEIF funds may be used to advise the public of services performed by the electrical contractor industry. The NEIF may also seek improved and uniform government codes. Funds may be expended to train employees or acquaint them with new products. Management and sales personnel may also be trained at NEIF expense. The NEIF may also pay the employer's cost of collective bargaining. In short, *each permissible NEIF activity is consistent with the "basic principles" set forth above and to the benefit of the non-NECA contractor.* (Emphasis added.)

C.

The Decision Below

Sustaining the district court's summary judgment holding, a divided panel held that the Fund constituted illegal *per se* price fixing, and enjoined the defendants from receiving Fund payments from non-NECA contractors who *voluntarily* accepted the obligations and

⁴ The unpublished opinion of the United States District Court for the Eastern District of Virginia appears in the Appendix at pp. 121a-126a.

benefits of local IBEW-NECA collective bargaining agreements.

The lower court reached this conclusion even though (1) it saw nothing wrong with collecting the Fund from NECA contractors; (2) the Fund provision nowhere referred to the price of electrical contracting services, and certainly did not fix the price of such services; (3) the Fund affected but one small element of the cost of labor; (4) non-NECA contractors were obligated to pay into the Fund only if they voluntarily gave NECA authority to bargain on their behalf or voluntarily assented to local IBEW-NECA agreements;⁵ (5) non-NECA contractors remained free to negotiate their own IBEW agreements excluding the Fund provision altogether; and (6) the Fund had no demonstrated impact on commercial competition.

For the lower court majority, the issue boiled down to the simplistic proposition that the defendants had agreed to include the Fund provision in all "IBEW construction contracts," thus depriving non-NECA contractors of the "competitive advantage" they had enjoyed by obtaining a free ride on NECA's efforts. According to the panel

⁵ Generally the local IBEW-NECA agreements which were amended to include the provisions of the National Agreement are renegotiated every year or two years. Since the Fund did not go into effect until six months after the National Agreement was adopted, any obligated contractor could withdraw his bargaining authority and limit his Fund obligation to the brief remainder of a single agreement's duration. By the time the district court entered its injunction, almost three years after the Fund's adoption, all non-NECA contractors had had more than ample opportunity to withdraw from NECA bargaining units and negotiate their own independent labor agreements, free of any Fund obligation.

majority this "clearly interfere[d] with the market forces that set the price of such contracts" and "would tend to stabilize the price of electrical construction contracts, a practice illegal *per se* under the Sherman Act." Significantly, there was no evidence before the court to support this entirely gratuitous presumption.

We believe that in making its finding that the Fund provision was to be inserted in "all agreements," the court below misapprehended the intent of the parties. As the deposition testimony and other evidence showed, their real intent was to insert the industry fund only in NECA agreements and to have it apply only to NECA members and those other contractors who voluntarily designated NECA as their bargaining agent or adopted NECA agreements. Nevertheless, in view of the lower court's holding that lack of coercion was irrelevant and its failure to find that any non-NECA contractor was in fact coerced, this Court need not review the lower court's finding concerning the purported scope of the agreement. The agreement, even as interpreted by the court below, does not constitute illegal *per se* price fixing.⁶

⁶ The lower court did not attempt to explain how the defendants intended to accomplish the fund's "insertion" in non-NECA agreements. In fact, involuntary insertion was impossible because (1) NECA has nothing to do with the negotiation of non-NECA agreements, and (2) since industry funds are permissive, not mandatory, bargaining subjects, any non-NECA contractor could squelch any attempt by the IBEW to include the Fund provision in its contract by simply refusing to talk about it. As the NLRB found, the union was well aware that it was prohibited by labor law from negotiating to impose on a permissive subject of bargaining. Significantly, plaintiffs neither alleged nor proved that any of them was a party to a single non-NECA agreement which included the industry fund provision, much less that they were ever compelled to adopt the Fund provision.

To Circuit Judge Hall, dissenting, the majority's "blind application of the *per se* rule against price fixing . . . ignores the realities of this case . . ." Confronting these realities, the dissenting judge pointed out that "one of the main purposes of the industry fund is to help defray the costs of the negotiation process" and that under the majority's ruling, "non-NECA contractors would continue to enjoy the benefits of NECA's bargaining" without paying their share of those costs (678 F.2d at 503-04).

V.

REASONS WHY THE PETITION SHOULD BE GRANTED

A.

This Case Presents An Important Question Of First Impression Which Should Be Considered By This Court—Whether Voluntary Payment Into An Industry Fund, Typical Of Funds Prevalent Throughout The Construction Industry—Constitutes Illegal *Per Se* Price Fixing.

The Court should grant certiorari in this case of admitted "first impression" to determine whether voluntary payment into an industry fund, typical of thousands of such funds long existing throughout the construction industry, constitutes illegal *per se* price fixing under the antitrust laws. It has long been established that industry funds are permissive bargaining subjects under the national labor laws and may lawfully be inserted in collective bargaining agreements. Nevertheless, the Fourth Circuit concluded that the Fund constituted illegal *per se* price fixing because it added "1% of labor costs" to "IBEW construction contracts."

The panel's decision ignores entirely the recognized status of industry funds as a *bona fide* permissive subject of bargaining. See, e.g., *Detroit Window Cleaners Union, Local 139 (Daelyte Service Co.)*, 126 NLRB 63 (1960);

Mechanical Contractors Ass'n. v. Local 420, United Ass'n. of Journeymen, 167 F.Supp. 35 (E.D.Pa. 1958), *aff'd.*, 265 F.2d 607 (3rd Cir. 1959). Inclusion of permissive bargaining subjects in collective bargaining agreements is part of "the very fabric of effective collective bargaining." *Oil, Chemical & Atomic Workers International Union v. National Labor Relations Board*, 405 F.2d 1111, 1117 (D.C. Cir. 1968) (Burger, J.).

This Fund is not materially different from all other industry funds which have long been recognized as lawful subjects of bargaining. Industry funds have existed on a widespread basis throughout the construction industry for many years. There is nothing mysterious or venal about them. They are simply a method that has been developed for collecting funds from consenting employers to improve labor relations and employer and employee productivity throughout the construction trades.

Typically, funds like the one at issue here are established as provisions of collective bargaining agreements negotiated between industry bargaining units and the unions representing various trades and crafts. All employers who adopt such agreements pay into these funds. The purpose is to provide funds to negotiate and administer collective bargaining agreements, improve job proficiency, train employers in the development of better business practices, keep them advised of new technology, assist them in training managers and supervisors, and similar endeavors. Since the entire unionized industry benefits from these funds, the practice is for union employers to contribute voluntarily to them. This is precisely what is involved here.

The panel majority's *per se* holding totally disregards the benefits which industry funds confer on association and non-association contractors alike. It utterly ignores

Judge Hall's dissenting conclusion that "[s]ince all electrical contractors benefit from NECA's collective bargaining, it is only fair that they share in the costs of such bargaining." 678 F.2d at 504. Indeed, the fact that a "restraint" is designed to eliminate "free riders" has been cited by this Court as a reason for judging it under the rule of reason, rather than the *per se* standard. *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 55 (1977).⁷

Petitioners submit that the Fund bears no resemblance to any of the "naked" restraints traditionally considered *per se* antitrust violations. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979). Rather, it is a well recognized subject of bargaining beneficial to the entire electrical construction industry. The Court should grant certiorari to resolve an unprecedented question of antitrust law: whether inclusion of an industry fund in a multiemployer agreement pursuant to a binding delegation of bargaining authority constitutes illegal *per se* price fixing.

⁷ Since *Sylvania*, a substantial body of case law and scholarly commentary has endorsed applying the rule of reason to restraints engendered by a legitimate desire to eliminate "free riders." See, e.g., *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982); *U.S. Trotting Ass'n v. Chicago Downs Ass'n, Inc.*, 665 F.2d 781 (7th Cir. 1981); *USM Corp. v. SPS Technologies, Inc.*, 1982-83 Trade Cas. ¶ 65,077 (7th Cir. 1982).

B.

**The Court Of Appeals' Unprecedented Condemnation Of A
Voluntary Industry Fund Is In Direct Conflict With Decisions
Of The National Labor Relations Board And Misapplies This
Court's Holding In *Perma Life***

The lower court's summary judgment holding—that voluntary inclusion of an industry fund in a multiemployer collective bargaining agreement constitutes *per se* price fixing—is in conflict with national labor policy and with the holdings of the NLRB and its General Counsel dealing with this industry fund.

The decision below ignores the established labor law principle that industry funds may properly be proposed for inclusion in a collective bargaining agreement so long as they are not insisted upon to the point of impasse. For this reason alone the Court should review this case to resolve its conflict with national labor law and policy. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958).

Responding to plaintiffs' charges that the IBEW illegally coerced non-NECA contractors to adopt the Fund provision, the NLRB extensively investigated the implementation of the 1976 National Collective Bargaining Agreement. Rejecting plaintiffs' charges, the Board's General Counsel concluded that "the International's policy at all times *was to request, rather than insist*, that the Industry Fund be included during negotiations with non-NECA members" (Appendix, pp. 127a-133a, at p. 129a, emphasis added).

In the three cases where it was alleged that isolated local unions of the IBEW used coercion to obtain contractor acceptance of the Fund, the Administrative Law Judges found no coercion (Appendix, pp. 134a-150a and

151a-168a). The only case which Plaintiffs elected to appeal was affirmed by the National Labor Relations Board. *IBEW Local No. 12 (Commonwealth Electric Co.)*, 252 NLRB No. 40 (1980).

The lower court sidestepped the Board's determination by the astonishing holding that coercion was irrelevant. Relying solely on this Court's *in pari delicto* holding in *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968), the lower court majority held that even if non-NECA contractors voluntarily elected to become parties to the "conspiracy" by accepting the fund obligation, they were still entitled to relief under the antitrust laws.*

The court's reliance on *Perma Life* misses the mark. That case held only that a nominal co-conspirator, injured by a naked *per se* restraint, was not necessarily barred from asserting a claim because of his own participation in the illegal conspiracy. The *Perma Life* holding comes into

*The court's unprecedented expansion of *Perma Life* has this extraordinary result: A non-NECA contractor goes to the local union's hiring hall with the option of either assenting to an IBEW-NECA collective bargaining agreement, which contains the Fund provision, or of negotiating a separate independent agreement without the Fund. Since the industry fund is a permissive subject of bargaining, the union cannot and will not, as the NLRB found, insist on its inclusion in the independent agreement. If, however, the employer prefers not to negotiate independently, he will simply accept the IBEW-NECA agreement as his own. If the lower court decision stands, the employer adopting the second option may be allowed to sue and collect three dollars for every dollar he voluntarily contributes to the Fund. Thus the voluntary inclusion of a valid bargaining subject in an unexceptional collective bargaining agreement is converted into—according to class counsel's estimate—a \$120,000,000 treble damage windfall (Appendix, p. 172a).

play only after a restraint of trade has been established, and the secondary question then arises whether those who are restrained are entitled to damages. *But the existence of the restraint must first be established.*⁹

The court below did not find that collecting Fund payments from NECA members was in any sense an illegal restraint of trade. The holding was that the Fund could not be collected from consenting non-NECA contractors because it eliminated a competitive advantage enjoyed by those contractors. But if this was a "competitive advantage" it was one that non-NECA contractors relinquished *voluntarily*, presumably because they believed that the countervailing benefits they received justified the Fund obligation.¹⁰ The fact that non-NECA contractors voluntarily accepted the Fund negates the existence of any restraint imposed upon them. *See Columbia*

⁹ The facts in *Perma Life* highlight its inapplicability to this case. There the plaintiff franchisees had been presented with form franchise agreements, containing a variety of illegal restraints (i.e., vertical price fixing, tie-ins, exclusive dealing arrangements and territorial restrictions), on a take-it-or-leave-it basis. This Court held only that the franchisees acceptance of their franchises did not bar them, on the theory of *in pari delicto*, from claiming injury as a result of their franchisers' imposition of the illegal restraints.

¹⁰ The vast majority of non-NECA contractors who accepted the terms of IBEW-NECA collective bargaining agreements paid into the Fund without protest, presumably because they recognized that they had voluntarily agreed to accept the Fund obligation, and because they realized that they benefitted from the industry services which the Fund financed. The sole class representatives in this case are two dissatisfied former NECA members who desire to free ride on NECA's efforts. Yet even they concede the value of NECA's services. Thus the General Counsel of one of the two class represent-

Broadcasting System, Inc. v. ASCAP, 620 F.2d 930, 936 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

There is no valid distinction between a NECA member who authorizes a chapter to negotiate for him, and is thus bound by any lawful agreement made, and a non-NECA contractor who voluntarily gives the chapter written authority to negotiate contracts and amendments on his behalf or voluntarily adopts an already negotiated agreement containing the Fund. Both NECA and non-NECA contractors have voluntarily agreed to accept the terms of a valid collective bargaining agreement, including the industry fund. Yet, as a result of the lower court's incomprehensible distinction, voluntary adoption of the Fund by NECA contractors is permissible, while voluntary adoption by non-NECA contractors is *per se* illegal price fixing.¹¹

atives, William Schwartzkopf of plaintiff Commonwealth Electric, testified that Commonwealth voluntarily continued to make NEIF payments in the St. Paul, Minnesota area in recognition of the valuable collective bargaining and labor relations services performed by the local NECA chapter. Schwartzkopf Dep., pp. 490-493; 530-533. Since the class representative *voluntarily* elected to contribute to the Fund, how can it now be heard to demand treble damages?

¹¹ The lower court's illogical distinction dissolves under analysis. Assume that a contractor joins NECA, and agrees to be bound by the terms of a local IBEW-NECA agreement, including the industry fund. There is no violation here under the lower court's holding. During the term of the agreement, he resigns from NECA, but continues to operate under the terms of the IBEW-NECA agreement, and continues to pay without protest into the industry fund. Under the lower court's decision, his resignation from NECA converts lawful payment into illegal *per se* price fixing. No rationale can justify this result.

We submit that plaintiffs failed to demonstrate any restraint of trade, much less illegal *per se* price fixing, in the absence of proof that they were compelled to forego their alleged "competitive advantage." Despite the absence of any restraint on any contractor's freedom of choice, the lower court, by its egregious misapplication of the *in pari delicto* doctrine, violated fundamental anti-trust principles and endangered the institutions which maintain the collective bargaining structure of an entire industry. In so doing the lower court has come into serious conflict with national labor law and policy. This conflict should be resolved by the Court.

C.

The Court Of Appeals' Novel Holding That A Legal Subject Of Bargaining—Absent Any Demonstrated Effect On Commercial Competition—Constitutes Illegal *Per Se* Price Fixing Conflicts With Important Antitrust Principles Established By This Court in *Apex Hosiery*

Just as no finding was ever made that any non-NECA contractor was compelled to accept the Fund provision, no finding was ever made that payment into the Fund affected commercial competition in any business market. The district court expressly declined to make any such finding—and for good reason. The Fund obligation was simply so small an element of cost in comparison with the other labor and cost factors that go into making up a job bid that it could not be presumed to have any demonstrable impact on the composition of competitive bids.¹²

¹² Executives from a number of plaintiffs testified at deposition that the Fund did not affect their competitive position (Appendix, pp. 189a-192a; 187a-188a). The district court held that all such evidence was irrelevant because proof of anticompetitive effect was

Nowhere does the Fund provision even refer to the price of electrical contracting work. Yet, despite the absence of any finding of actual anticompetitive effect, the court below adopted a *conclusive presumption* that the industry fund "would tend to stabilize the price of electrical construction contracts, a practice illegal *per se* under the Sherman Act." This holding makes a mockery of the axiom that a labor agreement is not an actionable restraint of trade absent "some form of restraint upon commercial competition in the marketing of goods or services." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940). *Accord*, *Mid-American Regional Bargaining Ass'n v. Will County Carpenters Dis. Council*, 675 F.2d 881 (7th Cir. 1982) *cert. denied*, 103 S.Ct. 82 (1982).

The lower court's suggestion that the price fixed was the price of "IBEW construction contracts" (678 F.2d at 501) makes its decision even more mystifying. The only "IBEW construction contracts" at issue are *collective bargaining agreements*. Collective bargaining agreements are not commodities which are bought and sold; they have no "price" which can be fixed in violation of the antitrust laws. The only price they directly affect is the price of labor; and the price of labor is, by statute, "not a commodity or article of commerce." 15 U.S.C. Sec. 17.

There is simply no justification for equating an insignificant increase in the cost of labor with fixing the price of electrical contracting work in a commercial market. An increase in the cost of labor may or may not result in a

unnecessary as a matter of law (498 F.Supp. at 537-39; Appendix, pp. 69a-72a). The court of appeals, though not mentioning this evidence, implicitly agreed with the district court (678 F.2d at 501; Appendix, pp. 15a-16a).

commercial price increase. The requirement that an actual effect on commercial competition be proven cannot be satisfied by the expedient of labelling every increase in the cost of labor as "price fixing." See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979). Otherwise, every collective bargaining agreement which increased the cost of labor would be suspect as price fixing.

The panel's facile *per se* price fixing theory is totally unrealistic. There is no reason for singling out one particular bargaining subject—an industry fund which equitably distributes necessary industry labor costs—and labelling it illegal *per se* price fixing. Bargaining subjects typically impact the cost of labor. The very purpose of collective bargaining is to establish the cost of labor. By equating a one per cent or less increment of labor cost with illegal *per se* price fixing, the court below ignored the crucial distinction made in *Apex Hosiery* between a valid collective bargaining agreement, sanctioned by national labor policy, and a restraint directly imposed on commercial competition. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 533-34, n.24 (5th Cir. 1982).

The lower court's rule of *per se* illegality does not discriminate between "good" and "bad" industry funds, but would summarily condemn them all. By this indiscriminate misapplication of the *per se* standard, petitioners were deprived of the opportunity of defending the Fund under the rule of reason. Instead, the lower court created a new category of illegal *per se* price fixing out of whole cloth, without any showing that any price was fixed or that there was any anticompetitive effect on commercial competition, much less a demonstration that industry funds have a universally pernicious effect on commercial competition.

The Court should grant certiorari to decide whether inclusion of a legal subject of bargaining in a collective bargaining agreement, absent any demonstrated effect on commercial competition, constitutes illegal *per se* price fixing.

D.

The Fourth Circuit's Decision To Apply A *Per Se* Standard To A Collective Bargaining Agreement Conflicts With This Court's Decision In *Connell* And Decisions Of Other Circuits.

This Court and the courts of appeal have been reluctant to apply the *per se* standard in a collective bargaining context. In *Connell Construction Co. v. Plumbers & Steamfitters, Local No. 100*, 421 U.S. 616 (1975), the Court found that a secondary boycott agreement was subject to the antitrust laws. But, instead of holding that the boycott was *per se* illegal (as it did in a non-labor context in *United States v. General Motors*, 384 U.S. 127 (1966)), the Court remanded the case "for consideration whether the agreement violated the Sherman Act." The Court noted:

In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. *Id.* at 636.

The Fourth Circuit's imposition of *per se* liability is in conflict with the approach taken by the Second and Eighth Circuits. These circuits have held that, even when labor's antitrust exemption is inapplicable, labor antitrust cases should ordinarily be evaluated under the rule

of reason. *Berman Enterprises Inc. v. Local 333, Int'l Longshoremen's Ass'n*, 644 F.2d 930 (2d Cir. 1981); *Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133, 136, n.6 (8th Cir. 1979). Recent scholarly commentary also favors the application of the rule of reason. See, e.g., Casey & Cozzillow, *Labor-Antitrust: The Problems of Connell and a Remedy That Follows Naturally*, 1980 Duke L.J. 235, 278; Comment, *Consolidated Express: Antitrust Liability for Illegal Labor Activities*, 80 Col. L.Rev. 645, 660-63 (1980).¹³

But even were the Fund not part of a legitimate collective bargaining agreement, it should not have been summarily condemned as illegal *per se* price fixing. The court below stated:

The critical analysis in determining whether a particular activity constitutes a *per se* violation is whether the activity on its face seems to be such that it would always or almost always restrict competition and decrease output instead of being designed to increase economic efficiency and make the market more rather than less competitive. 678 F.2d at 500 (citing *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979)).

The required "critical analysis" has not been made here. Nor could it be made without a trial on the merits enabling the jury to weigh all material aspects of the Fund—its purpose, its effect, its benefits and its voluntariness. Yet the court below condemned the Fund

¹³ The court below made no attempt to distinguish its own earlier precedent in *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980), *cert. denied*, 449 U.S. 870 (1980), which, like the cases cited above, rejected the imposition of *per se* liability in a collective bargaining context. Indeed, despite the dissent's reliance on *Smitty Baker*, the panel majority fails even to mention it.

as illegal *per se* price fixing on a motion for summary judgment. The lower court's failure to recognize that the industry fund should be evaluated under the rule of reason conflicts with prevailing law and should be reviewed by this Court.

VI.

CONCLUSION

This case presents important issues concerning industry funds which have never before been considered under the antitrust laws. Industry funds have existed in the construction industry on a widespread basis for years. They have never before been condemned or even considered under the antitrust laws. They should not have been summarily adjudged illegal *per se* price fixing without any inquiry under the rule of reason into their utility or actual competitive impact.

The court below, by inventing a novel and insupportable *per se* price fixing classification and applying it to a lawful and prevalent type of labor agreement, greatly expands the impact of the antitrust laws on collective bargaining and creates serious conflicts with national labor law and policy. It also threatens to inflict financial ruin on petitioners, who for decades have provided responsible and peaceful collective bargaining for the entire electrical construction industry. Petitioners respectfully submit that the lower court's decision is of immense legal

and practical significance to the entire construction industry and certiorari should be granted.

Respectfully submitted,

EARL W. KINTER
DONALD M. BARNES
DENNIS C. CUNEO
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Ave. N.W.
Washington, D.C. 20036-5339
(202) 857-6044

MILTON HANDLER
STANLEY D. ROBINSON
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

GUY FARMER
(Counsel of Record)
FARMER, MCGUINN, FLOOD,
BECHTEL & WARD
1000 Potomac Street, N.W.
Suite 402
Washington, D.C. 20007
(202) 298-6910
SHALE D. STILLER
PETER H. GUNST
FRANK, BERNSTEIN, CONAWAY
& GOLDMAN
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 547-0500

Attorneys for Petitioners National Electrical Contractors Association, Robert L. Higgins and H.E. Autrey and Other Individuals Sued In Their Individual Capacities and as Trustees of The National Electrical Industry Fund; Colgan Electric Company, Inc. and Miller Electric Company

January 7, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 80-1808
80-1809

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., *et al.*
Defendants-Appellants

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*
Plaintiffs-Appellees

Appeal from the United States District Court for the District
of Maryland. Herbert F. Murray, District Judge.

Argued March 3, 1981

Decided May 17, 1982

Before WIDENER and HALL, Circuit Judges, MICHAEL,
District Judge*

* United States District Court for the Western District of
Virginia, sitting by designation.

Stanley D. Robinson (Kaye, Scholer, Fierman, Hays & Hand-
ler; James P. Garland, Anthony W. Kraus, Nora Winay, Sem-
mes, Bowen & Semmes; Laurence J. Cohen, Richard M. Res-
nick, Sherman, Dunn, Cohen, Leifer & Counts; Milton Hand-
ler, Michael Malina; Peter H. Gunst, Mary K. Farmer, Frank,
Bernstein, Conaway & Goldman; Guy Farmer (Farmer, Wells,
McGuinn, Flood & Sibal, on brief) and Donald M. Barnes (Earl
W. Kintner, Dennis C. Cuneo, Arent, Fox, Kintner, Plotkin &
Kahn, on brief) for Appellants; Wilbur D. Preston, Jr. (Robert

M. Wright, Gerson B. Mehlman, James R. Chason, Whiteford, Taylor, Preston, Trimble and Johnston, on brief; Alan D. Cirker (Anthony J. Obadal, Zimmerman and Obadal; Ira Greenberg, Stokes & Shapiro, on brief) for Appellees; (K. L. Estabrook, Donald F. Nicolai, Lindabury, McCormick and Estabrook, on brief) for Amicus Curiae Mechanical Contractors Association of America, Inc.; (John P. Frank, Lewis and Roca, on brief) for Stephen J. Burton, Felhaber, Larson, Fenlon and Vogt, on brief) for Amicus Curiae NECA, Pipe, and Masonry; (Robert J. Fenlon, Stephen J. Burton, Felhaber, Larson, Fenlon and Vogt, on brief) for Amicus Curiae The Sheet Metal and Air Conditioning Contractors National Association, Inc.; (J. Albert Woll and Lawrence Gold on brief) for Amicus Curiae The American Federation of Labor and Congress of Industrial Organizations; (Jerry J. Williams, Keith B. Bardellini, Freshman, Mulvaney, Marantz, Comsky, Forst, Kahan & Deutsch, on brief) for Amicus Curiae Construction Industry Advancement Fund of Southern California, Fund for Construction Industry Advancement, San Diego Construction Industry Advancement Fund, and Associated General Contractors, San Diego County, Inc.

WIDENER, Circuit Judge:

The National Electrical Contractors Association, the International Brotherhood of Electrical Workers, and other defendants appeal the award of a permanent injunction to plaintiffs who include the National Constructors Association and numerous construction companies, after a finding that the actions of the defendants amounted to price fixing illegal under § 1 of the Sherman Act, 15 U.S.C. § 1. *National Constructors Association, et al. v. National Electrical Contractors Association, Inc., et al.*, 498 F. Supp. 510 (D. Md. 1980). This appeal is taken under 28 U.S.C. § 1292(a)(1) permitting appeals from the award of injunctive relief. A FRCP 54(b) certificate was entered by the district court relating to the counterclaims. We affirm, and modify the injunctive order only slightly.

This case involves a private antitrust action for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26, and damages under § 4 of that Act, 15 U.S.C. § 15, for a violation of § 1 of the Sherman Act, 15 U.S.C. § 1.¹ The plaintiffs below, appellees here, are the National Constructors Association (NCA), an unincorporated trade association made up of companies who perform electrical construction work and transact business in the electrical construction industry, and other corporations performing electrical contracting work which employ IBEW electrical workers.² The defendants below, appellants here, are the National Electrical Contractors Association (NECA), an incorporated trade association, whose members perform electrical construction work; the International Brotherhood of Electrical Workers (IBEW), an unincorporated labor union representing electrical workers throughout the country, Charles H. Pillard, President of IBEW International; Robert L. Higgins, Executive Vice President of NECA; Miller Electric Co. and Colgan Electric Co., corporations engaged in electrical contracting work and members of NECA; and the trustees of the National Electrical Industry Fund.³

¹ § 1 of the Sherman Act provides in part:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

² The district court has certified a class of plaintiffs as those electrical contractors who, since July 1, 1977 have not been members of NECA and who perform electrical construction work using workers obtained or employed under the terms of collective bargaining agreements with locals of the IBEW, which agreements contain or incorporate by reference the terms of Article 6 of the NECA-IBEW national agreement.

The plaintiffs/appellees may be referred to as NCA or as appellees.

³ The defendants/appellants may be referred to as NECA or as the appellants.

NECA is the largest trade association in the electrical contracting industry, consisting of at least 133 local trade associations or chapters whose members are both union and non-union electrical contractors. The IBEW is the largest union representing electrical workers, representing the vast majority of all of the organized electrical workers in the nation. At the time of the district court's order the members of NECA performed slightly more than 50% of the electrical contracting work in the nation. Since 1960 NECA members have performed between 50 and 60% of such work. Because of their respective positions, much of the collective bargaining in the electrical contracting industry is done by IBEW and NECA. Local chapters of NECA are assigned territories throughout the country which coincide with the jurisdiction of one or more of the more than 400 IBEW locals. The local chapters of NECA act as multi-employer bargaining representatives and negotiate local collective bargaining agreements with the local IBEW unions. Individual electrical contractors who are not members of NECA usually enter into a labor agreement with the IBEW in one of several ways: (1) Letter of Assent—A—An "A" Letter of Assent authorizes the local NECA chapter to act as the collective bargaining representative for the employer in negotiations with the local union. As such, the employer is, of course, considered a member of the NECA chapter bargaining unit. (2) Letter of Assent—B—A "B" Letter of Assent binds the employer to the terms of the local IBEW-NECA collective bargaining agreement and all approved amendments, but does not make the employer part of the bargaining unit. (3) International agreements—Designed for employers operating on a national basis, such an agreement binds the employer to the terms of local union contracts in the areas in which the employer performs work. (4) Project agreements—These agreements apply to a single construction site and contain any provisions that may be agreed upon. A local contractor may also negotiate separately with the IBEW although this is not commonly done.

Both NECA and IBEW International reserve the right to approve or veto all collective bargaining agreements entered into by the local organizations.

NECA and IBEW International also enter into national agreements, whose terms are incorporated into local agreements between NECA and IBEW. It is a provision of the 1976 National Agreement between NECA and IBEW⁴ that appellees challenged below as being in violation of the Sherman Act. The first five articles of the 1976 agreement provide for the National Electrical Benefit Fund (a pension fund), shift work, management rights, and apprentice ratios. Article 6, the one challenged below, provides for the establishment of an industry fund. Article 6 states:

The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.

All construction agreements in the electrical industry shall contain the following language:

"Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer." *(an amount not to exceed 1% nor less than 0.2 of 1% as determined by each local chapter and approved by the trustees)

The National Electrical Contractors Association will be responsible to see that the objects of the fund, as outlined in the trust, are adhered to strictly.

No part of the funds collected under this trust shall be used for purely social activities.

No part of the funds collected under this trust shall be used for any purpose which is held to be in conflict with the

⁴ This agreement was announced in the spring of 1976 and ratified at the October 1976 meeting of the NECA Board of Governors. The agreement went into effect on July 1, 1977.

interests of the International Brotherhood of Electrical Workers and its local unions.

Both parties will be provided with a copy of the Trust and any further amendments.⁵

On December 8, 1976, President Pillard of IBEW and Vice President Higgins of NECA signed the agreement containing the provision for the industry fund. Contemporaneously they signed a paper called "Basic Understandings and Interpretations of the IBEW-NECA Agreement" which provided in part:

Article Six—Industry Fund

(1) It is understood that because of the cost of administration of labor agreements, industry advancement and services rendered to the electrical contracting industry by the National Association and the NECA chapters that the intent of this Article is to insert the industry fund contribution language in all IBEW construction agreements containing the NEBF language except those covering employees of utility companies and municipalities and employees working under contractor equipment maintenance agreements and employees working for motor shops. In return, NECA will provide basic service to electrical contracting employers employing workmen obtained from the IBEW without regard to the affiliation of the individual employer with NECA.

Appellees challenged the industry fund provision under the Sherman Act, alleging that the fund added a 1% charge to the cost of all their electrical construction contracts with IBEW whether the contractor belonged to NECA or not. Appellees noted that prior to the 1976 agreement members of NECA paid dues and a service charge for their membership in and services

⁵ The National Agreement provides that less than 1% of the labor payroll may be collected by the local NECA chapter, but the local must collect at least .2 of 1%, the amount which must be remitted to the national organization. Both parties, as well as the district court, have treated the required contribution to be 1%. The record supports a conclusion that 1% is the usual amount collected.

received from NECA.⁶ The 1976 agreement thus increased their cost of doing business. Thus, non-NECA members, who paid no dues or service charges, had a competitive advantage over NECA members when bidding on contracts. In order to end this situation, argued appellees, appellants initiated the 1% contribution to be applied uniformly to all IBEW construction contracts whether the contractor was a member of NECA or not, thereby stabilizing the price of electrical construction contracts. As a result, non-NECA contractors no longer had a competitive edge over their NECA competitors. Appellees claimed that appellants' actions constituted price fixing, a per se violation of the Sherman Act. The district court agreed and in a thorough and detailed opinion granted summary judgment for the appellees, finding the anticompetitive purpose necessary for a finding of price fixing a per se violation of the Sherman Act.⁷

The district court also summarily dismissed as without merit the NECA defendants' counterclaims that appellees were engaged in a boycott, illegal under § 1 of the Sherman Act, by their concerted refusal to pay what they owed into the industry fund. 498 F. Supp. at 551. The NECA defendants appeal this grant of summary judgment for the appellees on the counterclaims.

Before dealing with appellants' substantive arguments, we note that appellants Colgan Electric and Miller Electric argue as a separate issue that the district court erred in not granting their motion to dismiss the complaint because venue was improper as to them since they were not transacting business in

⁶ The dues were \$50.00 per year with a service charge of .2% of their labor payroll after the first year of membership.

⁷ The district court discussed at length the evidence before it which had been produced by both sides regarding the agreement. We need not discuss such evidence in any detail except as it applies to the issues to be dealt with later in this opinion.

Maryland as required by § 12 of the Clayton Act, 15 U.S.C. § 22.⁸ The district court found that they were in fact transacting business in Maryland because of their dealings with NECA to which they both belonged and paid substantial amounts in the form of dues and industry fund contributions. We cannot say that such a conclusion is clearly erroneous, and accordingly affirm the district court's denial of the motion to dismiss. *United States v. Scophony Corp.*, 333 U.S. 795 (1947). See especially *Scophony* at p. 807, and the concurring opinion of Justice Frankfurter at p. 818.

Appellants' primary contention on appeal is that summary judgment for the appellees in their price fixing case was inappropriate. Preliminarily we note that the Supreme Court has cautioned against the granting of summary judgment in antitrust cases, stating in *Poller v. Columbia Broadcasting Systems*, 368 U.S. 464, 473 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles . . .," and we have had occasion to follow this case in *Morrison v. Nissan Co., Ltd.*, 601 F.2d 139 (4th Cir. 1979). This is not to say that summary judgment is never appropriate in antitrust cases, see *White Motors Co. v. United States*, 372 U.S. 253 (1963), and in fact grants of summary judgment in such cases have been explicitly affirmed. *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969); *First National Bank v. Cities Service*, 391 U.S. 253 (1968).

With these rules in mind, we analyze appellants' arguments. They initially contend that summary judgment was inappro-

⁸ § 12 of the Clayton Act reads in part:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business . . .

The parties agree that Miller and Colgan are neither inhabitants of Maryland nor are they found there.

priate because a genuine issue of fact exists regarding the meaning of Article 6 of the NECA-IBEW National Agreement. First, they argue that the language of Article 6, when considered in connection with the remainder of the National Agreement, is ambiguous on its face. The district court disagreed, holding instead that the language in the agreement clearly required the inclusion of the fund in all IBEW electrical construction contracts at issue here. We agree that there is nothing ambiguous at all about the agreement's language. On its face the agreement requires inclusion of the industry fund clause in all such contracts.

Even if the language itself is clear, argue the appellants, a consideration of the evidence submitted in the form of documents and pre-trial depositions create an issue of fact as to the meaning of Article 6. To support his argument, appellants principally rely upon several pieces of evidence which we shall consider separately. We find no error in the district court's rejection of the pre-trial depositions submitted by the appellants as sufficient to create an issue of fact. This testimony amounted to no more than a denial of the meaning of the clear words of the contract. In no way does it seek to clarify the terms of the contract, but instead seeks to change the terms of an already clear agreement.⁹

Appellants also contend that other documents submitted to the district court create a question of fact as to the meaning of Article 6. The minutes of the October 1976 Board of Governors meeting of NECA reflect that Robert Higgins, Executive Vice President of NECA, read to the group a letter from its counsel,

⁹ This also applies to IBEW President Pillard's letter to NCA in June 1977 in which Pillard denied the interpretation of the agreement that NCA placed upon it, but immediately followed the denial with the statement that: "It is true that, by July 1, 1977, we expect that all local IBEW-NECA agreements will have been amended to include a number of new provisions, including contributions to the [Industry] Fund."

Henry H. Glassie, with reference to whether or not the NECA bylaws would have to be amended to reflect the industry fund as a change in NECA dues. Concluding that they would not, Glassie in part stated, as transcribed, as follows: "If the industry fund provided for in the Article 6 of the agreement referred to in proposal number 3 applies to the NECA members, as such, a change in the by-laws would be involved. However, we are informed that the contribution to this fund as provided in Article 6 will be required of all union electrical contractors whether they are members of NECA or not. Indeed, would be applicable to a company after resignation from NECA. And moreover that the contribution will not be required of non-NECA members and nonunion members of NECA."

We first note that the minutes of the meeting are self contradictory. At one place they state that the industry fund contributions are "required of all union electrical contractors whether they are members of NECA or not." In the second sentence following, the minutes then contradict themselves as they state that "the contribution will not be required of non-NECA members and non-union members of NECA." The very best that can be said of the minutes is that they both corroborate and flatly contradict NECA's position in the case. There was a mistake made in reading the letter from Glassie, however, or in the transcription of the minutes of the meeting. The letter itself did not contain the critical words "non-NECA members and," but read (in the form of a clause in the letter) "The contribution will not be required of non-union members of NECA." Even if we accept the minutes of the meeting instead of the content of the letter (and no reason is offered as to why the letter is not the proper document to use), they do not clarify any claimed ambiguity existing in the agreement but amount at the best to no more than an ambiguous interpretation thereof. The letter from Glassie obviously supports the already clear contract terms, and, indeed, its observation that contribution would not be required of non-union members of NECA only states the obvious. In all events, the status of non-union members of NECA is not a matter of dispute in this case and is of no consequence.

Appellants next rely upon a December 1976 letter from Charles Pillard, President of IBEW International, to its locals which notes that local unions are to seek to reopen agreements with non-NECA employees by mutual consent to include the industry fund in "all non-NECA inside and outside construction agreements." We see no way that this letter supports appellants' position, rather, it supports appellees' contention that the provision for the industry fund goes in all applicable contracts. We reject appellants' argument that this evidence shows that they merely intended to request the inclusion of the fund in labor contracts, for the letter obviously applied to existing contracts which would require agreement to change.

Appellants next rely upon three letters from Pillard to three different local unions, their text being very similar, advising the locals that they must bargain in good faith with contractors who terminated their letters of assent. Again, we do not see how these letters support appellants' contentions. At best they show that the local unions were advised as to their obligations under the National Labor Relations Act to bargain in good faith as to a whole contract and not take a take or leave it stance in negotiations.

Finally, appellants rely upon a June 1978 letter from Pillard to the union locals which stated that local unions should specifically remove from the bargaining table the industry fund if a contractor objected to its inclusion. Not only was this letter sent almost a year after this lawsuit was filed, it only reflects how the union at that later time wished to handle the industry fund. It does not clarify the agreement itself.

All of this evidence taken together shows no more than appellants' attempt to change the meaning of the National Agreement to reflect how they *now* wish the contract to be read. None seeks to clarify any particular language or term in the National Agreement. As such, they have no effect upon an obviously clear agreement.

The National Agreement and the Basic Understanding must be considered together as documents which are a part of the

same transaction. *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261 (5th Cir. 1966); 4 Williston, *Contracts* (3d Ed.) § 628. The agreement states very clearly that the industry fund goes "in all construction agreements in the electrical industry." As such, we need go no further to find appellants' intent. *Locafance U.S. Corp. v. Intermodal Systems Leasing*, 558 F.2d 1113 (2d Cir. 1977); *E. P. Hinkel Co. v. Manhattan Co.*, 506 F.2d 201 (D.C. Cir. 1974). But, even if we go further, the Basic Understanding says the same thing, to wit: "in all IBEW construction agreements containing the NEBF language." The evidence shows, without dispute, in the NECA-IBEW Employees Benefit Agreement, that all contracts with IBEW unions contain NEBF provisions whether the contractor belongs to NECA or not. These two documents, then (the National Agreement and the Basic Understanding), read separately or together leave no doubt as to the applicability of the industry fund to all IBEW construction contracts. Appellants' evidence shows no more than that NECA and the IBEW sought to read the contract differently at a later date.

We also agree with the district court that the evidence presented was so removed in time and self serving as to not create a genuine issue of fact as to the meaning of the contract. The district court did not err in relying upon the clear language of the agreement in deciding the issue in the appellees favor.¹⁰

¹⁰ Appellants further claim that in actuality IBEW did not insist upon inclusion of the fund in every contract signed, and that some labor contracts entered into during this time did not include the industry fund. The fact that the IBEW was somewhat less diligent than it might have been in enforcing the provisions of the National Agreement is not a defense, especially since the language of the agreement itself leaves no room for debate that the fund was to be included in all construction contracts. An activity does not have to be a complete success to violate the antitrust laws. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 402 (1927); *United States v. Bensinger Co.*, 430 F.2d 584 (8th Cir. 1970); *Plymouth Dealers Assoc. v. United States*, 279 F.2d 128 (9th Cir. 1960).

Va. Impression Products Co. v. SCM Corp., 448 F.2d 262 (4th Cir. 1971).

Appellants next claim that the district court erred in concluding that the agreement in question constituted price fixing illegal per se under the Sherman Act. Instead, they contend that no restraint of trade existed. Alternately, if a restraint of trade is found, appellants contend that it must be judged under the rule of reason.

Although a literal reading of the Sherman Act would make illegal all contracts if they restrain trade in any particular, the Supreme Court has construed the statute to outlaw only unreasonable or undue restraints. *Standard Oil of N.J. v. United States*, 211 U.S. 1 (1911). In *Standard Oil* the Court established the rule of reason as a method of examining the actions of parties to determine if § 1 has been violated by looking at the purpose, character, and effect of the actions in question. Unreasonableness is based upon either the nature of the contract or upon the surrounding circumstances that give rise to an inference that the parties intended to restrain trade or enhance prices. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). By this standard, the courts decide whether conduct is unreasonably anticompetitive in character or in effect.

Certain practices whose nature and effect are so clearly anticompetitive have been held to be illegal per se. Those specifically include price fixing.¹¹ E.g. *United States v.*

¹¹ As the Supreme Court noted in *Northern Pacific RW v. United States*, 356 U.S. 1, 5 (1958): "because of their pernicious effect on competition and lack of any redeeming virtue [such activities] are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." The Court mentioned price fixing, division of markets, group boycotts, and tying arrangements.

Socony-Vacuum Oil Co., 310 U.S. 150 (1940); *Pa. W. & P. Co. v. Consolidated G.E. L. & P. Co.*, 184 F.2d 552 (4th Cir. 1950). The critical analysis in determining whether a particular activity constitutes a per se violation is whether the activity on its face seems to be such that it would always or almost always restrict competition and decrease output instead of being designed to increase economic efficiency and make the market more rather than less competitive. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

As just noted, price fixing is one of those practices that the Court has held to be illegal per se under the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). The Court stated at 223 "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." To be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing.¹² An activity can violate the per se rule even if its effect upon prices is indirect. *United States v. General Motors*, 384 U.S. 127, 147 (1966). In essence, an interference with the market forces freely setting the prices of goods is sufficient. *In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127, 1137 (5th Cir.) cert. den. 433 U.S. 910 (1977).

¹² *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), elimination of interest free short term credit; *United States v. Container Corp. of America*, 393 U.S. 333 (1969), exchange of price information as stabilizing although lowering prices; *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), setting minimum prices; *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951), setting maximum prices; *United States v. Socony-Vacuum Oil*, 310 U.S. 150 (1940), buying surplus gasoline to stabilize prices; *Plymouth Dealers Assoc. of Northern Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960), establishing price list from which negotiations began.

There can be no doubt that the agreement in question here, which adds a 1% charge to all IBEW construction contracts falls within the definition of price fixing. By taking the additional 1% of labor costs from non-NECA contractors it robs them of a competitive advantage beneficial to the public. It clearly interferes with the market forces that set the price of such contracts. The industry fund would tend to stabilize the price of electrical construction contracts, a practice illegal per se under the Sherman Act.

Appellants further contend that even if the per se doctrine is applicable the district court erred because a genuine issue of fact existed as to the purpose of the fund. Additionally, they argue that the district court erred as a matter of law because it concluded that an anticompetitive effect need not be shown in order to prove price fixing. Appellants would argue instead that both anticompetitive purpose and effect must be proven. Such an argument is without merit. We know of no better statement of the rule than that of this court in *United States v. Society of Ind. Gasoline Marketers*, 624 F.2d 461, 465 (4th Cir. 1979), cert. den. 101 S.Ct. 859, where we stated: "Since in a price-fixing conspiracy the conduct is illegal per se, further inquiry on the issues of intent or the anti-competitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since '[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition.' *United States v. Trenton Potteries*, 273 U.S. 392, 397 . . ." See also 2 Areeda & Turner, *Antitrust Law* § 314.¹³ As this decision makes clear, a specific finding of anticompetitive purpose and effect is not

¹³ In *United States v. McKesson & Robbins*, 351 U.S. 305 (1956), the Court stated: "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act & that its illegality does not depend on a showing of its unreasonableness, since it is conclusively presumed to be unreasonable. It makes no difference whether the motives of the

needed. But, even if it were, there is no doubt, as the district court found, that, on its face, this agreement has an anticompetitive purpose, which is to add the 1% of labor cost to all IBEW construction contracts which could only stabilize prices of NECA and non-NECA contractors.

This brings us to appellants' objections to the injunctive order entered by the district court which was in two parts.

The first part of the injunction enjoins NECA and IBEW and others named from "seeking to continue, continuing, enforcing, maintaining, or renewing Article 6 of the National Agreement . . . as to any person, corporation, or other entity which is not a member of the National Electrical Contractors Association or from entering into, maintaining or participating in any act, contract, agreement, understanding, plan, program, or other arrangement with any person, corporation, or other entity which is not a member of the National Electrical Contractors Association that includes any provision for implementation of Article 6 of the aforesaid agreement." The second part of the injunction enjoins the same defendant from "demanding, soliciting, collecting or receiving from any person, corporation or entity which is not a member of the National Electrical Contractors Association contributions to the National Electrical Industry Fund, or any alternate or substitute therefor, the effect of which would be to add a surcharge, determined by a uniform formula, to the cost of procuring all contracts with the IBEW in the electrical construction industry."

Appellants object to the first part of the injunction as being overbroad in that a non-NECA employer who voluntarily as-

participants are good or evil, whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices."

sents to pay into the industry fund should not have been included. That objection is without merit. In *Perma Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968), the Court held that the fact the plaintiff may have been *in pari delicto* does not prevent a suit under § 1 of the Sherman Act. The Court said the courts do not "have power to undermine the antitrust acts by denying recovery to injured parties merely because they have participated to the extent of utilizing illegal arrangements formulated and carried out by others." p. 139. Thus, under *Perma Mufflers* there is no reason to deny non-NECA employers relief although they may have previously voluntarily assented to a NECA-IBEW agreement.

Appellants next object to the second part of the injunction which they say could be construed to prohibit any demand that an IBEW local might unilaterally make in collective bargaining to be characterized as a uniform surcharge on labor contracts. They say that it prevents the union, even acting unilaterally, from doing the very thing that § 7 of the National Labor Relations Board Act, 29 U.S.C. § 157, permits unions to do, that is, to bargain collectively on any permissive or mandatory subject of bargaining. That objection is well taken only to a very small extent. The question of whether or not the industry fund is either a permissive or mandatory subject of collective bargaining is not before us, but, for present purposes, we will assume that it is a permissive subject of collective bargaining.

Merely, however, because establishment and maintenance of the industry fund may be a permissive subject of collective bargaining does not automatically exempt the IBEW from the provisions of the antitrust laws. This was specifically held in *Allen Bradley v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945). In *Allen Bradley* the Court upheld a finding of the district court which had found Local 3 of IBEW guilty of a violation of the Sherman Act for acting in concert with business organizations and with manufacturers of goods to restrain competition in and monopolize the marketing of such goods in New York City. The Court found that "... the same labor union activities may or may not be in violation of the Sherman

Act, dependent upon whether the union acts alone or in combination with business groups." 325 U.S. at 810. The gist of the Court's reasoning, which is applicable here, is found on the same page of the opinion where it said: "For if business groups, by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves." The Supreme Court in *Allen Bradley* did require a modification of the decree "so as to enjoin only those prohibited activities in which the union engaged in combination 'with any person, firm or corporation which is a non labor group.' " p. 812. The second part of the order complained of does no more than this. It enjoins the "above mentioned defendants" (which include NECA and IBEW) from demanding, etc., from non-NECA members contributions to the National Electrical Industry Fund. The order must be read in the context of the case instead of divorced from it. As such, it undoubtedly means the defendants acting together and not the defendants acting severally. It leaves IBEW entirely free to pursue any legitimate object of collective bargaining acting unilaterally, but, this, of course, does not include IBEW acting "with any person, firm or corporation which is a non-labor group," *Allen Bradley*, p. 812, to violate the Sherman Act, and this expressly includes the maintenance of the industry fund as expressed in the contract between NECA and IBEW.

The standard by which we review such injunctive orders is "whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 698 (1978). We think the order of the district court meets that standard; it does no more than enjoin the enforcement of, and collection of money under, a contract held to violate the antitrust laws.

Despite what we have just said with respect to the second part of the order complained of, out of perhaps an over abundance of caution, and in order to prevent any reading out of context of that part of the district court's order, we direct that

the district court modify the second part of its order so that it applies to IBEW only when IBEW is engaged in the prohibited activities "in combination with any person, firm or corporation which is a non-labor group." *Allen Bradley* at 812.

We have discussed in some detail the principal contentions of appellants and note that we have considered all of their other assignments of error and find them without merit, including those relating to the granting of summary judgment in favor of appellees on the NECA defendants' counterclaims. Except as may be otherwise indicated in this opinion, we rely upon the district court's complete and thorough discussion of the issues in this case, and its judgment is accordingly

AFFIRMED AS MODIFIED.¹⁴

HALL, Circuit Judge, dissenting:

Through its blind application of the *per se* rule against price fixing, the majority ignores the realities of this case and, as a consequence, reaches a manifestly inequitable result. As I believe that the facts before us do not justify an extension of the *per se* price fixing rule, I must respectfully dissent.

¹⁴ We are aware that, on its particular facts, this is a case of first impression and as such we should be careful in applying the *per se* rule. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 9 (1979). Cases are legion, however, declaring the illegality of price fixing in various forms, and the agreement here, we think, is as clear as the one struck down in *Citizens Publishing Co. v. U.S.* 394 U.S. 131 (1969). The conclusion reached by the Court in that case that "[t]he joint operating agreement exposed the restraints so clearly and unambiguously as to justify the rather rare use of a summary judgment in the antitrust field," p. 136, is applicable here. The Supreme Court, indeed, in *United States v. Container Corp.*, 393 U.S. 333 (1969), a price fixing case "unlike any other" decided by that Court, found a *per se* antitrust violation in reviewing a dismissed complaint, certainly without the benefit of any more documents than we have available here.

Under a provision in the collective bargaining agreement between the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW), the IBEW could not sign any employment contract unless the employer agreed to pay one percent of its gross monthly labor payroll into the National Electrical Industry Fund. Finding that this requirement acts to increase the labor costs to non-NECA contractors and "would tend to stabilize the price of electrical construction contracts," the majority concludes that the agreement is *per se* illegal under the Sherman Act, 15 U.S.C. § 1.

This case, however, is inherently different from those relied on by the majority in that all of the parties involved here receive an extremely important benefit from the NECA/IBEW negotiations, that being the establishment of a fixed wage level. "Assenting" non-NECA contractors (i.e., those who agree to follow the terms of the NECA/IBEW agreement through either "A" or "B" Letters of Assent or International Agreements) receive the benefit directly by accepting all of the gains and concessions secured by NECA during the course of the negotiations.

Non-assenting contractors who bargain directly with the Union enjoy the benefit in a similar, albeit indirect, manner. They have the terms of the NECA/IBEW agreement, especially the wage level, on which they can rely during the course of their independent negotiations. The salary level agreed to by NECA may be employed as a ceiling on the Union's demands. Indeed, the Union has an incentive to obtain a high wage rate from NECA which it will then attempt to carry over into its non-NECA contracts. *See generally* P. Samuelson, *ECONOMICS* 586-87 (10th ed. 1976). Thus, any wage concessions NECA is able to draw out of IBEW spill over to the benefits of all non-assenting non-NECA contractors.

Since all electrical contractors benefit from NECA's collective bargaining, it is only fair that they share in the costs of such bargaining. In this regard, it is clear that one of the main

purposes of the industry fund is to help defray the costs of the negotiation process. Under the majority's ruling, however, although both assenting and non-assenting non-NECA contractors would continue to enjoy the benefits of NECA's bargaining, neither can be required to contribute to the fund. Moreover, they will receive a windfall in the form of treble damages.

In *Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416 (4th Cir.), *cert. denied*, 449 U.S. 870 (1980), we ruled that a protective wage clause, requiring a union to demand the wage scale from all employers who were not members of the multi-employer bargaining unit, did not constitute a *per se* violation of the Sherman Act. Rather,

[t]o amount to an antitrust violation *the agreement must be rooted in an anti-competitive purpose*, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws.

Id. at 431-32 (emphasis supplied).

Since the one percent industry fund charge at issue here has no greater effect on electrical contractor prices than would a protective wage clause, I would follow the *Smitty Baker* standard and avoid the majority's untenable extension of the *per se* rule.

As a final matter, I also disagree with the majority's conclusion that the trial judge did not err in finding defendants Colgan Electric Co. (Colgan) and Miller Electric Co. (Miller) within the venue of the court. The record indicates that their most significant contact with the judicial district of Maryland was the payment of dues to NECA which has its national office located in that state. The holding that mere membership and payment of trade association dues is enough to constitute "transact[ing] business" under § 12 of the Clayton Act, 15

U.S.C. § 22, flies in the face of the well established rule that a defendant's contacts with the forum state must be of a "*substantial* character" in order for venue to be proper. See *Bartholomew v. Virginia Chiropractors Association*, 612 F.2d 812, 815 (4th Cir. 1979), *cert. denied*, 446 U.S. 938 (1980). Consequently, the district court clearly erred in failing to dismiss the complaint against defendants Colgan and Miller.

For the foregoing reasons, I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-1302

NATIONAL CONSTRUCTORS ASSOCIATION and COMMONWEALTH
ELECTRIC COMPANY, by and on behalf of itself and
all others similarly situated and
THE HOWARD P. FOLEY COMPANY, by and on behalf of itself
and all others similarly situated and
DONOVAN CONSTRUCTION COMPANY OF MINNESOTA, INC.,
ARTHUR MCKEE & COMPANY, INC., BADGER AMERICA, INC.,
CATALYTIC, INC., C. F. BRAUN CONSTRUCTORS, INC., DRAVO
CORPORATION, GUY F. ATKINSON COMPANY, THE H. K.
FERGUSON COMPANY, JACOBS CONSTRUCTORS, INC., PULLMAN
KELLOGG, DIVISION OF PULLMAN, INC.,
STEARNS-ROGER, INC.,

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC.,
ROBERT L. HIGGINS, THE INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO, CHARLES H. PILLARD,
COLGAN ELECTRIC, INC., MILLER ELECTRIC CO., and
H. E. AUTREY, ALLEN L. BADER, FRANK H. BERTKE,
DONALD C. CATES, ROBERT W. COLGAN, JOE R. DEVISH, and
CARL T. HINOTE, in their individual capacities and as
Trustees of the National Electrical Industry Fund, and
ALLAN H. STROUPE, L. R. MCCORD, ALDO P. LERO and
LOWELL C. TIMM, in their official capacities as Trustees of
the National Electrical Industry Fund, and
JOHN OSTROW, C. W. STROUPE, WARREN LOSH and J. D.
HILBURN, SR., in their individual capacities.

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Wilbur D. Preston, Jr., Robert M. Wright, Nevett Steele, Jr.,
and Ward B. Coe, III, of Whiteford, Taylor, Preston, Trimble
& Johnston, Baltimore, Maryland; Anthony J. Obadal, Steven
R. Semler, Howard J. Kaufman, Alan D. Cirker; Stephen C.
Yohay, of Zimmerman and Obadal, Washington, D.C.; Ira

Genberg, Peter R. Spanos, of Stokes & Shapiro, Atlanta, Georgia, Attorneys for Plaintiffs.

Guy Farmer, of Farmer, Shilbey, McGuinn & Flood, Washington, D.C.; Alan I. Baron, Peter H. Gunst, of Frank, Bernstein, Conaway & Goldman, Baltimore, Maryland; Attorneys for Defendant National Electrical Contractors Association, Inc. and all other defendants EXCEPT Defendants International Brotherhood of Electrical Workers, AFL-CIO and Charles H. Pillard.

Thomas X. Dunn, Richard M. Resnick, of Sherman, Dunn, Cohen and Liefer, Washington, D.C.; James P. Garland, Anthony W. Kraus, Steven D. Frenkil, Nora Winay, of Semmes, Bowen & Semmes, Baltimore, Maryland, Attorneys for Defendants International Brotherhood of Electrical Workers and Charles H. Pillard, International President of IBEW.

Herbert F. Murray, United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-1302

NATIONAL CONSTRUCTORS ASSOCIATION, ETC. *et al.*

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*

MEMORANDUM OPINION

I. Factual Background

This is a private antitrust action for treble damages and declaratory and injunctive relief, brought under § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Currently pending before the court are eight motions, on which the court has heard extensive oral argument. An explanation of the factual background of the dispute is essential to an understanding of the pending motions.

Plaintiff National Constructors Association (NCA) is an unincorporated trade association whose members are "corporations who perform electrical construction work and who otherwise transact business in the electrical construction industry." Amended Complaint at 4. Of the remaining plaintiffs, Commonwealth, Foley, Donovan, Catalytic, Braun, Atkinson, Ferguson and Pullman-Kellog are corporations which perform electrical construction work and employ electrical construction workers who are members of the defendant IBEW and its local unions. McKee, Badger, Dravo, Jacobs and Stearns-Roger are also corporations which perform electrical construction work, but rather than employ IBEW workers directly, they hire electrical construction contractors who in turn employ IBEW labor. None of those corporate plaintiffs except Donovan is a member of defendant National Electrical Contractors Association, Inc. (NECA).

Defendant NECA is an incorporated trade association whose members, like those of NCA, perform electrical construction work. Although NECA's principal place of business is in Bethesda, Maryland, the association has approximately 133¹ local chapters nationwide. NECA and its local chapters provide various services to member companies, including representing members in collective bargaining with the IBEW and its local unions. Amended Complaint ¶ 4(a)(iii).

Defendant IBEW is an unincorporated labor organization whose local unions throughout the United States represent at least some of the electrical workers whom the corporate plaintiffs employ. Defendant Charles H. Pillard is now and at all pertinent times was International President of the IBEW; defendant Robert L. Higgins is and at all pertinent times was Executive Vice President of NECA.

Defendants Colgan Electric Co. and Miller Electric Co. are corporations engaged in the electrical contracting business and are members of defendant NECA. The remaining defendants are the trustees of the National Electrical Industry Fund (NEIF), which is more fully described below.

At the heart of the plaintiffs' suit is the collective bargaining structure in the electrical construction industry. Local chapters of NECA, which is the largest trade association in the industry, are assigned regional territories throughout the country which coincide with the jurisdictions of one or more IBEW local unions. Acting as a multi-employer bargaining unit representing its chapter members, each NECA chapter periodically negotiates a collective bargaining agreement with the IBEW union or unions in its territory. Each "Local Agreement" provides for wages, hours, terms and conditions of employment, and any other subjects of bargaining permitted

¹ Some of the pleadings set the figure at 330. Suffice it to say that the local chapters are numerous.

by the National Labor relations Act. A Local Agreement is either "inside," covering labor on the interior or buildings, or "outside," covering labor on outdoor power lines. Although the IBEW locals also negotiate with other local contractors' associations, the majority of the Local Agreements are the result of collective bargaining between the unions and NECA chapters.

Individual electrical contractors who are not members of NECA usually enter into a labor agreement with the IBEW in one of three ways. The most prevalent practice is for the contractor to sign a short-form agreement known as a Letter of Assent, which binds the signatory to the terms of the existing NECA-IBEW Local Agreement for the area in which the contractor works. There are two types of Letters of Assent: Type "A" authorizes the local NECA chapter to act as the signatory's collective bargaining agent for all matters contained in the existing NECA-IBEW Local Agreement, and remains in effect until the contractor gives timely notice of termination. Type "B" does not authorize NECA to act as the contractor's collective bargaining agent, but merely binds the signatory for a stated period (usually the life of the current Local Agreement) to all the terms of the existing Local Agreement and any amendments that might be made to it.

The second method by which an unassociated contractor enters into a labor agreement with the IBEW is by signing an "International Agreement." Large general contractors which perform construction work at several sites across the country usually adopt this second method. The International Agreement is in effect a nationwide Letter of Assent, which binds the signatory to the terms and conditions of the NECA-IBEW Local Agreements for any and all geographic areas in which the general contractor seeks to procure IBEW labor. Made available by the IBEW's international office, an International Agreement is terminable at will upon sixty days' notice.

The third means of negotiating with the IBEW is by signing a "Project Agreement." As the name implies, such an agreement is usually designed to cover a single construction project

which the contractor has in the area, and may contain any terms on which the parties agree. Although a Project Agreement is negotiated independently of the NECA agreements, the IBEW usually seeks to procure the terms of the Local Agreements in an unassociated contractor's Project Agreement.

Both NECA and the IBEW International reserve the power to approve all collective bargaining agreements entered into by local chapters or local unions. Either national body may veto an agreement if its terms do not conform to the association's or the union's policies.

As of December 1976, the vast majority of contractors in the electrical construction industry procured IBEW labor under the terms and conditions of NECA-IBEW Local Agreements, either as members of local NECA chapters, or as signatories to Letters of Assent or International Agreements.

In the summer and fall of 1975, national officials of NECA and the IBEW began negotiation of the agreement which the plaintiffs contend violates § 1 of the Sherman Act. The parties undertook the negotiations at least in part to provide for increased employer contributions to the National Electrical Benefit Fund (NEBF), which is a pension fund for IBEW workers, jointly administered by NECA and the IBEW and funded by payments provided for in electrical construction industry collective bargaining agreements. At the meetings that began in 1975, International President Charles H. Pillard and his Administrative Assistant Marcus Loftis represented the IBEW; Executive Vice President Robert L. Higgins and Director of Labor Relations Mark Hughes represented NECA.

In the spring of 1976, the parties tentatively agreed to what will hereinafter be referred to as the National Agreement, a copy of which is appended hereto as Exhibit A. The first five articles of the agreement contained provisions for the NEBF, shift work, management rights and apprentice ratios. Article Six, which is the crux of this litigation, provided as follows:

ARTICLE SIX—INDUSTRY FUND

The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.

All construction agreements in the electrical industry shall contain the following language:

"Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer."

*(an amount not to exceed 1% nor less than 0.2 of 1%, as determined by each local chapter and approved by the trustees)

The National Electrical Contractors Association will be responsible to see that the objects of the fund, as outlined in the trust, are adhered to strictly.

No part of the funds collected under this trust shall be used for purely social activities. No part of the funds collected under this trust shall be used for any purpose which is held to be in conflict with the interests of the International Brotherhood of Electrical Workers and its local unions.

Both parties will be provided with a copy of the Trust and any future amendments.

The industry fund thus created was to be used primarily to cover NECA's "costs of administration of labor agreements, industry advancement and services rendered to the electrical contracting industry." *See* Exhibit 10 to plaintiffs' motion for summary judgment.

As required by the association's bylaws, the NECA Board of Governors ratified the National Agreement at a meeting in Dallas in October 1976. The IBEW rules did not require a similar ratification vote. On December 8, 1976, both Charles Pillard and Robert Higgins signed the agreement, which was to become effective on July 1, 1977.

Between December 1976 and July 1977, NECA and the IBEW took steps to implement the National Agreement, including the new NEIF. Local IBEW unions and NECA chapters were instructed to insert the industry fund provision in existing NECA-IBEW Local Agreements. Although the defendants contend that the language of Article 6 was to be inserted only in contracts between the IBEW and NECA members, the plaintiffs argue that the defendants sought to have the language included in all construction agreements in the electrical industry.

The plaintiffs allege that prior to July 1, 1977, NECA members paid dues to their association in order to pay for the services NECA offered such as advertising, negotiating, training employees and disseminating information. Because those dues added to NECA members' cost of doing business, non-NECA members allegedly had a competitive edge in bidding on electrical construction projects. The plaintiffs claim that by providing for a uniform 1% contribution to a fund that would support NECA services, and by ensuring that the 1% requirement was in *all* construction contracts in the industry, regardless of a contractor's affiliation with NECA, the defendants agreed to fix, maintain and stabilize the price of contracts with the IBEW—and consequently all prices in the electrical construction industry—for the purpose of eliminating non-NECA members' competitive advantage. The plaintiffs contend that under the line of cases beginning with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the National Agreement constitutes a price fixing agreement which is on its face a *per se* violation of § 1 of the Sherman Act. They seek a declaratory judgment that the NEIF is illegal, an injunction preventing the defendants from enforcing the NEIF provisions, and monetary relief of three times the amount each plaintiff has already paid into the fund.

NECA and the trustees of the NEIF have filed counterclaims alleging that the plaintiffs have engaged and are engaging in an illegal conspiracy and boycott in violation of § 1 of the Sherman Act. The activity alleged to be illegal is the plaintiffs'

concerted undertaking to refuse to pay into the NEIF, with the alleged purpose of injuring NECA and compelling it to acquiesce in the plaintiffs' plans for "a single multitrade bargaining agreement [in] all unionized sectors of the industrial construction industry." Memorandum in Support of Motion of NECA and the Trustees of the NEIF for Summary Judgment, at 1.²

Of the eight motions now before the court, three are motions to dismiss. The first is the defendants' motion to dismiss NCA as a plaintiff on the grounds it lacks standing. The second is the defendants' motion to dismiss those plaintiffs who do not hire IBEW labor directly, but instead employ electrical contractors who in turn hire IBEW workers. Those parties will be referred to hereinafter as the "indirect-hire plaintiffs." The third motion is that of defendants Miller and Colgan to dismiss the complaint as to them, on the grounds that they as corporations were not involved in any alleged conspiracy.

The fourth and fifth motions to be decided are cross-motions for summary judgment on the plaintiffs' claim that the National Agreement is on its face a price-fixing agreement illegal *per se*. The sixth motion is the plaintiffs' motion for class certification, and the remaining two are cross-motions for summary judgment on the boycott counterclaims. The court will discuss the motions in the order in which they have been described.

II. The Motion To Dismiss Plaintiff NCA

The primary issue is whether NCA has standing to sue for injunctive relief under § 16 of the Clayton Act, 15 U.S.C. § 26. The defendants argue that a private plaintiff does not have

² The NEIF trustees have filed a number of related actions throughout the country, seeking to recover on a breach of contract theory the amounts which several electrical contractors have refused to pay into the NEIF. For purposes of this opinion, the related actions will be referred to as the "collection cases."

standing at all under the antitrust laws, unless it can show some injury or threatened injury *personal to itself*; and that NCA has made no such showing. NCA claims that strict standard applies only under § 4 of the Clayton Act (15 U.S.C. § 15), where a plaintiff seeks monetary damages; and that § 16 embodies more flexible general rules of standing, including the tests set out in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333 (1977), for determining when an association may sue in a purely representational capacity on behalf of its members.

If NCA could meet the stricter standard of showing direct injury to itself, there would be no need to explore the relative leniency of § 16 requirements. However, the court is not persuaded that the association is threatened with any personal harm. NCA alleges that the NEIF scheme compels NCA members to support a rival trade association, NECA, and "necessarily places a financial stricture on the operation of their own association, therefore tending to have a stifling effect upon the achieving of their association's purposes either now or in the future." Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss NCA, at 2. NCA further contends that the NEIF scheme frustrates NCA's associational goal of reducing operating costs. In the court's view, the awkwardness and abstractness of the plaintiffs' description of the supposed injury reveals that NCA's contentions are without merit. Consequently, the court must determine whether the standing requirements of § 16 are nonetheless broad enough to encompass NCA.

There is long-standing authority in support of the defendants' proposition that *personal* injury is a prerequisite to instituting any private antitrust action. In *United States v. Borden*, 347 U.S. 514, 518 (1954), the Supreme Court said,

Under § 16 of the Act, . . . a private plaintiff may obtain injunctive relief against [anti-trust] violations only on a showing of "threatened loss or damage"; and this must be of a sort personal to the plaintiff. . . . [T]he private plaintiff, though his remedy is made available pursuant to

public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served.

However, since *Borden* was decided, two important trends have developed: first, the courts have increasingly acknowledged that standing requirements under § 16 are broader and more flexible than those under § 4; and second, the courts have recognized that under certain circumstances, an association may have standing solely as the representative of its members.

Section 4 of the Clayton Act provides as follows:

Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 16, however, states in pertinent part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

In *Hawaii v. Standard Oil Co. of Calif.*, 405 U.S. 251 (1972), the Supreme Court analyzed the "business or property" requirement in § 16. The Court speculated that the language difference was probably attributable to the different impacts of the remedies offered by the two sections: while 100 simultaneous injunctions could be no more effective than one, 100

treble-damage awards could be far more devastating to a defendant than a single monetary judgment. 405 U.S. at 261-62. Without commenting further on the § 16 standards, the Court concluded that a party could not sue under § 4 without showing injury to its commercial interests. *Id.* at 264.

Most lower federal court cases interpreting *Hawaii v. Standard Oil* have concluded that the standing requirements under § 16 are more lenient and more flexible than those under § 4. *In Re Multidistrict Vehicle Air Pollution MDL #31*, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); *Tugboat, Inc. v. Mobil Towing Co.*, 534 F.2d 1172 (5th Cir. 1976); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573 (3d Cir. 1979). *Contra*, *NAACP v. New York Clearing House Assn.*, 431 F. Supp. 405 (S.D.N.Y. 1977), *relying on Nassau County Ass'n of Inc. Agents, Inc. v. Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974). The cases recognizing a distinction between § 4 and § 16 requirements imply that a party may sue for injunctive relief under the antitrust laws whenever the party can show the threat of an injury cognizable in equity and proximately caused by the defendant's antitrust violation. *Mid-West v. Continental*, *supra*; *Tugboat v. Mobil Towing*, *supra*. See also *Buckley Towers Condominium, Inc. v. Buchwald*, 595 F.2d 253 (5th Cir. 1979).

At about the same time that the courts began to hold the requirements of § 16 were more lenient, the Supreme Court was developing the doctrine that in certain well-defined circumstances, an association may have standing to represent its members even when the association as such had suffered no injury. In *Warth v. Seldin*, *supra*, 422 U.S. 490 (1975), the court considered whether various individuals and associations had standing to challenge an allegedly exclusionary zoning ordinance. Writing for the Court, Justice Powell first set out the general standing requirements in any litigation: each plaintiff must show first that there is a justiciable case or controversy, and second that the plaintiff has "such a personal stake in the outcome of the controversy as to warrant his

invocation of federal court jurisdiction and to justify exercise of the court's remedial powers on his behalf." 422 U.S. at 498-99, citing *Baker v. Carr*, 369 U.S. 186 (1962). In elaborating on those prerequisites with respect to associations the Court said,

Even in the absence of injury to itself, an association may have standing solely as the representative of its members. . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction [citations omitted]. 422 U.S. at 511.

In *Hunt v. Washington Apple Advertising Commission*, *supra*, 432 U.S. 333 (1977), the Court reiterated the language just quoted from *Warth*, and rephrased it into a three-part test:

Thus we have recognized that an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. 432 U.S. at 343.

In establishing that test, the Court expressly rejected the defendant's claim that the Advertising Commission could not sue because it had no "personal stake" in the outcome of the case, and had alleged no "distinct and palpable injury" to itself. At 341-42.

In light of the developments in *Warth*, *Hunt* and the *Hawaii v. Standard Oil* line of cases, this court is persuaded that a plaintiff need not meet the strict personal injury standards of § 4 in order to sue for injunctive relief under § 16, and that an association may have standing under § 16 if it meets the three-part test of *Hunt*. *Associated General Contractors v. Otter*

Tail Power Co., 611 F.2d 684 (8th Cir. 1979); *National Office Machine Dealers Ass'n v. Monroe*, 484 F. Supp. 1306 (N.D. Ill. 1980). The court has discovered no persuasive authority that would indicate associational standing is precluded in the anti-trust context, and can think of no compelling reason why that should be the rule. the question remains whether NCA has satisfied all three prerequisites under *Hunt*; the court finds that it has.

The first requirement, that NCA's members or any one of them would have standing to sue in their own right, is clearly met. As corporations doing business in the electrical construction industry, and as signatories to labor agreements with the IBEW, at least some of NCA's members undoubtedly have standing to allege that the NEIF provision was to be inserted into *all* construction contracts in the electrical contracting industry, that the scheme as so defined violated the antitrust laws, and that the violation either caused or threatened to cause them direct, personal damage in the amount of the NEIF assessments. The court does not read *Hunt* to require that *each* of an association's members have independent standing. In this case, it is sufficient that a significant proportion of the association's members are obligated to contribute to the allegedly-illegal NEIF.

NCA has also satisfactorily shown that the interest it seeks to protect are germane to the organization's purpose. Among the association's objectives are "[t]o unite members of the Association in a concerted effort to influence and improve craftsmen efficiency and job performance as well as all other activities affecting operating costs and client relationships" and "[t]o inspire in labor and management a constant adherence to the highest ethical concept of individual and collective social responsibility." NCA Constitution Article II a. and e. Challenging an industry fund which allegedly raises operating costs and allegedly results from an illegal conspiracy between labor and management is certainly pertinent or relevant to NCA's stated purposes. The court does not believe the second prong of the *Hunt* test imposes a stricter standard than that.

The defendants argue that NCA cannot prove germaneness because it cannot show that the NEIF has any direct adverse impact on the association's professed goals. However, if that were the test under *Hunt*, the requirement of a showing of direct, personal injury to the association would in effect be reinstated.

In *Hunt* itself, the association whose standing was in dispute was the Washington Apple Advertising Commission, a state agency whose purpose was "protecting and enhancing the market for Washington apples." The Commission had no members in the traditional sense. The Supreme Court first noted that "[i]f the Commission were a voluntary membership organization—a typical trade association—its standing to bring this action as the representative of its constituents would be clear under prior decisions of this Court [citing *Warth v. Seldin*, *supra*]." 432 U.S. at 343. In a single sentence, the Court concluded that the Commission's efforts to remedy the injuries allegedly suffered by Washington apple growers was "central" to the Commission's stated purpose. *Id.* at 344. As far as establishing germaneness is concerned, NCA's objections are no more abstract and amorphous than those the Court so readily accepted in *Hunt*, especially in light of the fact that NCA is a "typical trade association" in the very industry affected by the NEIF.

Although the question is a much closer one, the court is also persuaded that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." The third prong of the *Hunt* test involves two considerations: (1) whether the nature of the claims involves individualized proof, *Hunt*, *supra*, 432 U.S. at 344; and (2) whether the association is competent to speak for its members, *Associated General Contractors v. Otter Tail*, *supra*, 611 F.2d at 691. For the reasons set forth *infra* in connection with the motion for class certification, the court does not believe the primary issues in the case require individualized proof. The defendants' contention that NCA's members' interests are too

diverse to be represented by the association deserves closer analysis.

In *Associated General Contractors v. Otter Tail*, *supra*, the Eighth Circuit found too many actual and potential conflicts among the members of a trade association to permit the association to speak for all of them. The association sought to enjoin the enforcement of an agreement that the court felt could benefit some members, hurt others, and affect still others not at all. 611 F.2d at 691. The defendants in the case at bar argue that NCA's members have similarly conflicting interests, and point to the fact that many member corporations have not joined in the suit or have voiced their opinion that the NEIF provisions do not injure them. In the court's view, such a "division within NCA" (see Exhibit E to the Reply Memorandum in Support of Defendants' Motion to Dismiss NCA) is not the kind of conflict that requires individual participation in the lawsuit. There is no evidence that any NCA member feels it stands to *benefit* from the NEIF, and that NCA's presence in the litigation therefore works against that member's interest.

The defendants have argued that some NCA members may oppose the suit to the extent it jeopardizes their delicate negotiating relationships with the IBEW. However, the court does not find that argument sufficient to establish the necessity of the allegedly dissenting members' individual participation. To hold otherwise would be to incorporate into the *Hunt* test a sort of adequacy-of-representation standard even more stringent than the one applied under Rule 23(a)(4) on a motion for class certification. See Part VI, *infra* at pp. 52-57. the plain language of *Hunt*'s third prong does not warrant such a holding. To the extent *Associated General Contractors* implies a different result, this court is not inclined to follow the Eighth Circuit's lead, at least under the circumstances presented by this case.

Because NCA meets all the prerequisites for an association bringing suit on behalf of its members, and because the court knows of no reason why those prerequisites should not apply in an antitrust case, the defendants' motion to dismiss NCA must be denied.

III. The Defendants' Motion For Dismissal On The Pleadings

The defendants have moved to dismiss the claims for damages and injunctive relief brought by those plaintiffs who do not hire IBEW labor directly, but instead employ electrical construction contractors who in turn employ IBEW workers. These "indirect-hire" plaintiffs are McKee, Badger, Dravo, Jacobs and Stearns-Roger. The defendants contend that those plaintiffs lack standing under §§ 4 and 16 of the Clayton Act because they cannot show any *direct* injury to themselves proximately caused by the allegedly-illegal NEIF. Although the court agrees that the indirect-hire plaintiffs have no standing to sue for treble damages, the court finds that those plaintiffs are not precluded from seeking injunctive relief. Accordingly, the defendants' motion must be granted in part and denied in part.

The indirect-hire plaintiffs have conceded that their claim for treble damages under § 4 of the Clayton Act is barred by the holding in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). That case established that a plaintiff has no standing to recover monetary damages if he alleges only that the "overcharge" resulting from an illegal price-fixing scheme was passed on to him as an indirect purchaser, through the chain of distribution, in the form of higher costs. The Court reasoned first that such "offensive" use of the passing-on theory should not be permitted when "defensive" use of the same theory had been prohibited in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* 392 U.S. 481 (1968); and second that the overcharged direct purchaser in a price-fixing scheme was the only party "injured in his business or property" within the meaning of § 4 of the Clayton Act. *Illinois Brick v. Illinois*, 431 U.S. at 728-29. The Court also noted its concern with preventing multiple, overlapping recoveries and with ensuring that damage recoveries would not be so divided as to discourage private enforcement of the antitrust laws. *Id.* at 738, 746-47.

The defendants in the instant case argue that *Illinois Brick* did not consider the implications of the passing-on theory in a suit for injunctive relief under § 16, and that the standing requirements under that section were therefore unaffected by the Supreme Court decision. The defendants contend further that the test under § 16 both before and since *Illinois Brick* has been the "target area" test, which is defined as follows in *NAACP v. New York Clearing House Ass'n*, 431 F. Supp. 405, 409-10 (S.D.N.Y. 1977):

In order to have standing to sue under the Clayton Act a plaintiff must show more than that he was injured as a result of an alleged antitrust violation, or even that his injury was foreseeable or intended. He must show that he is "within that area of the economy which is endangered by a breakdown in competitive conditions in a particular industry." In other words, the plaintiff must suffer direct injury as a result of the anti-competitive consequences of the defendants' acts. If not, then he cannot sue even if he has suffered injury as a result of his economic relationship to a target of the conspiracy or to one of the conspirators. [Footnotes ommitted.]

According to the defendants, the indirect-hire plaintiffs do not pass that test.

The court does not agree that the "target area" test is the correct one to apply when an indirect purchaser seeks only injunctive relief. Even before *Illinois Brick* was decided, the courts were beginning to recognize a distinction between §§ 4 and 16 of the Clayton Act. *Hawaii v. Standard Oil*, 405 U.S. 251 (1972); *In re Multidistrict Vehicle Air Pollution MDL #31*, 481 F.2d 122 (9th Cir. 1973). See the discussion *supra* in connection with the motion to dismiss NCA. Since 1977, that distinction has been held to permit an indirect purchaser to obtain an injunction as long as he can show the traditional "equitable entitlement" to such relief.

One of the leading cases on point is *Mid-West Paper Products Co. v. Continental Group*, *supra*, 596 F.2d 573 (3d Cir. 1979). At issue was an alleged conspiracy among manufacturers to fix the price of paper bags used in packaging cookies,

coffee, pet foods and the like. The indirect purchasers were supermarkets who bought the prepackaged groceries for resale to their customers. After dismissing the supermarkets' § 4 claims on the authority of *Illinois Brick*, the Third Circuit considered the supermarket plaintiffs' standing under § 16, noting first that the rationales of *Illinois Brick* had no application outside § 4 claims. The court then described the special position of the indirect purchaser:

For unlike other potential plaintiffs, who may be only remotely affected by the ripples caused by the conspirators' tampering with the supply and demand curve, indirect purchasers can state unequivocally that under all circumstances prevalent in the real economic world, money is passing from their hands into the pockets of the price fixers as a result of the conspiracy, and that no rational pricing decisions by an intermediary will erase this fact. [Footnotes omitted.] 596 F.2d at 593.

The court concluded that indirect purchasers were not precluded from obtaining injunctive relief as long as they could establish that "equity principles" entitled them to it. *Id.* at 594.

The Fifth Circuit reached a similar conclusion in *In re Beef Industry Antitrust Litigation*, MDL #248, 600 F.2d 1148 (5th Cir. 1979). The plaintiff cattlemen, ranchers and feeders alleged that the defendant supermarkets fixed the price at which beef was purchased from slaughterhouses and packers, and ultimately from the producers. The Fifth Circuit held that the district court had erroneously dismissed the plaintiffs' claims for an injunction. Finding that "the policy considerations underlying the pass-on rule are not implicated in claims for injunctive relief," Judge Wisdom then wrote:

To secure injunctive relief under section 16 of the Clayton Act, the plaintiffs need show only "threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26. to show a threat of such injury, plaintiffs in a case such as this would not have to show the extent of their harm. It would suffice to show by a preponderance of the evidence that the alleged price-fixing had or will have some adverse impact on the prices they receive for their

cattle, or that the conspiracy reduced the packers' demand for fat cattle. 600 F.2d at 1167.

The Eighth Circuit adopted a similar rule in *Paschall v. Kansas City Star Co.*, 605 F.2d 403, 408 (8th Cir. 1979):

To proceed under section 26, the injunctive relief provision, the plaintiff need only show that there is a threat that he will suffer fact of injury and that such threatened fact of injury is causally related to the defendant's pending anti-trust violation. [Footnotes omitted.]³

Judge Watkins of this court, in *Dart Drug Corp. v. Corning Glass Works*, Civil No. 72-664-W (D. Md. Oct. 29, 1979), relied on the Third and Fifth Circuit decisions to hold that *Illinois Brick* did not preclude injunctive relief for indirect purchasers, but that the plaintiff "must still establish, as § 16 requires, that principles of equity entitle it to such injunctive relief." Unpublished Memorandum Opinion at 24.

The defendants in the present action cite several cases for the proposition that an antitrust plaintiff may never have standing, under § 4 or § 16, unless the plaintiff can show *direct* injury. In *NAACP v. New York Clearing House*, *supra*, 431 F. Supp. 405 (S.D.N.Y. 1977), the court held that the standing requirements developed in treble damage suits applied to actions for injunctions as well. Although Judge Weinfeld acknowledged that the Supreme Court had recognized a distinction between the requirements of §§ 4 and 16, he was bound by the Second Circuit's consistent application of the "target area" test to claims for injunctive as well as monetary relief. *See, e.g., Nassau County Ass'n of Insurance Agents, Inc. v. Aetna Life & Casualty Co.*, 497 F.2d 1151 (2d Cir.), *cert. denied*, 419 U.S. 968 (1974); *Long Island Lighting Co. v. Standard Oil Co. of Calif.*, 521 F.2d 1269 (2d Cir. 1975), *cert. denied*, 423 U.S.

³ *Paschall* involved alleged violations of § 2 of the Sherman Act rather than price-fixing, and did not discuss purchasers. However, nothing in the court's interpretation of § 16 tended to limit that interpretation to the given facts.

1073 (1976). The defendants also cite *Parkview Markets, Inc. v. Kroger Co.*, 1978-2 Trade Cases ¶ 62,373 (S.D. Ohio 1978), in which the court found that the reasoning of *Illinois Brick* did preclude the plaintiffs' requested injunction.

This court is not persuaded that the cases the defendants have cited state the controlling rule of law. To begin with, the majority of those cases are from the Second Circuit, whose acknowledged rule rejecting the distinction between §§ 4 and 16 has not been adopted in the Fourth Circuit. Moreover, because *Parkview Markets* does not focus on an indirect purchaser claiming threatened injury from a price-fixing scheme, the case sheds little light on the question of when such a plaintiff's alleged injury should be considered too remote. Many of the other cases the defendants cite were decided prior to cases such as *Mid-West Paper* and *Paschall*, *supra*, and in the court's view do not reflect the most recent developments in this area of the law.

In sum, the weight of authority compels the conclusion that in order to have standing to sue for injunctive relief under § 16, an indirect purchaser must show only an "equitable entitlement" to such relief. The court interprets that requirement to mean that the plaintiffs must (1) "demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporaneous violation likely to continue or recur," *Zenith Radio Corp. v. Hazeltine Research, Inc.* 395 U.S. 100, 130 (1969), and (2) show that the threatened injury is proximately caused by the antitrust violation. *Mid-West Paper v. Continental*, *supra*, 596 F.2d at 594; *In Re Beef Industry Antitrust Litigation*, *supra*, 600 F.2d at 1167; *Paschall v. Kansas City Star*, *supra*, 605 F.2d at 409.

The violation which the indirect-hire plaintiffs here allege is the defendants' continuing conspiracy to fix, maintain and stabilize the prize of contracts with the IBEW. A scheme which raises a *direct*-hire contractor's cost of procuring IBEW labor very plainly threatens to raise the indirect-hire company's cost of employing that contractor. There is also a defi-

nite causal link between any overcharge illegally exacted from those who contract directly for IBEW labor and the threat that the overcharge will be passed on and therefore affect the indirect-hires' own cost of doing business. *Cf. Mid-West v. Continental, supra*, 596 F.2d at 593. Even if the effect on them is secondary and indirect, the plaintiffs in question are close enough to the "ripples" of the conspiracy to be entitled, under general principles of equity, to seek to enjoin the activity which threatens them. The harm they anticipate is clearly definable, and they are only one step removed from the employers who are directly affected by the alleged antitrust violation. The indirect-hire plaintiffs therefore have standing to seek injunctive relief under § 16, and the defendants' motion to dismiss the plaintiffs' claims under that section must be denied. However the motion must be granted with respect to the indirect-hires' claims for damages under § 4.

IV. Motion Of Defendants Colgan And Miller To Dismiss Complaint

Defendants Colgan Electric Co. and Miller Electric Co. have moved to dismiss the complaint as to each of them, on two grounds: first, that venue does not lie in this district as to either of them, and second, that the complaint fails to state a claim against either Colgan or Miller on which relief can be granted. Although the question is a close one, the court is of the view that venue *is* proper in this district. And under the liberal rules of pleading, the allegations of the amended complaint are sufficient to withstand the defendants' motion to dismiss for failure to state a claim.

The starting point for an analysis of venue in connection with a corporate defendant in an antitrust case is the special venue provisions of § 12 of the Clayton Act, 15 U.S.C. § 22:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and

all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

The parties do not dispute that Colgan and Miller are neither inhabitants of nor found in the District of Maryland. The only issue at this state of the analysis is therefore whether one or more of the defendant corporations "transacts business" in this district.

In general, the concept of "transacting business" is to be broadly defined, in order to facilitate actions against antitrust violators in the district where the injuries occurred and where the injured plaintiffs are at home. *Learning Systems, Inc. v. Levin*, 351 F. Supp. 532 (E.D. Mo. 1972); *National Auto Brokers Corp. v. General Motors Corp.*, 332 F. Supp. 280 (S.D.N.Y. 1971); *L.S. Good & Co. v. H. Daroff & Sons*, 263 F. Supp. 635 (N.D.W.Va. 1967). To that end, the test of venue is "[t]he practical, everyday business or commercial concept of doing or carrying on business 'of any substantial character.' *United States v. Scophony Corp.*, 333 U.S. 795, 807 (1948); *Grappone, Inc. v. Subaru of America, Inc.*, 403 F. Supp. 123, 128 (D.N.H. 1975); *Donlan v. Carvel*, 193 F. Supp. 246, 248 (D. Md. 1961). Beyond those general guidelines, the determination whether a corporation is transacting business within a particular district must ultimately be made on a case-by-case basis, according to the particular facts presented. *Grappone v. Subaru*, *supra*, 403 F. Supp. at 128; *United States v. Scophony*, *supra*, 333 U.S. at 819 (Frankfurter, J., concurring).

The facts concerning Colgan's and Miller's business transactions in Maryland do not make it readily apparent whether the corporations' commercial contacts with the district have been "substantial" or not.⁴ Affidavits submitted by the president of

⁴ For venue purposes, a defendant's contacts with a district are scrutinized as of the time of the alleged antitrust violations; that is, when the cause of action accrued. *Board of County Commissioners v. Wilshire Oil Co.*, 523 F.2d 125 (10th Cir. 1975); *Eastland Construction Co. v. Keasbey and Mattison Co.*, 358 F.2d 777 (9th Cir. 1966).

each corporation attest that neither defendant has made or solicited sales, performed services or advertised its business in Maryland. Neither corporation has been qualified to do business here, has had a resident agent, place of business, address, telephone or bank account here, or has owned property here. However, the plaintiffs contend that both corporations have engaged in certain transactions in Maryland which make venue in this district appropriate under 15 U.S.C. § 22.

The most important of the transactions the plaintiffs cite are Colgan's and Miller's purchases of services from the National Electrical Contractors Association through the association's headquarters in Bethesda, Maryland. Colgan has been an active member of NECA since 1949; Miller since 1932. Both corporations have paid NECA dues and additional service charges in exchange for such benefits as "labor relations services, marketing services, public relations services, representation with congressional bodies . . . [and] electrical code making services," Colgan deposition of March 17, 1978, at 71, and various NECA publications, Autrey deposition of March 23, 1978 at 53-60. Representatives of both companies testified at their depositions that their companies' memberships in NECA were highly beneficial and valuable. Colgan deposition at 71, 72 and 77; Autrey deposition at 55-56.

Between 1970 and 1977, before the NEIF went into effect, Colgan and Miller paid NECA⁵ the following amounts annually:

	<i>Colgan</i>	<i>Miller</i>
1970	\$ 2,824.55	\$3,025.11
1971	3,354.09	3,113.03
1972	3,621.61	3,733.65

⁵ The amounts represent the percentage of payments made to the local chapters which ultimately went to National NECA in Bethesda. Colgan deposition at 85-86.

	<i>Colgan</i>	<i>Miller</i>
1973	3,708.60	3,934.55
1974	5,060.00	5,310.00
1975	6,340.00	8,256.58
1976	7,129.00	9,925.00
1977	11,542.00	7,117.00

Answers of Colgan and Miller to plaintiffs' interrogatory no. 23, first set. Beginning in July 1977, each corporation made payments into the NEIF to support NECA services; 20% of those payments went directly to the association's national office in Bethesda. In the last six months of 1977, Colgan's NEIF payments totalled approximately \$19,000, and Miller's approximately \$41,000. Although the plaintiffs assert that they have been unable to obtain comparable information for the years 1978 and 1979, they contend that the corporations' total payments for NECA services has undoubtedly increased since 1977. Motions Hearing Transcript, December 21, 1979, at 1053.

The corporations' transactions with NECA are the primary foundation for the plaintiffs' argument that venue is appropriate in this district. However, the plaintiffs cite some additional transactions between the defendants and Maryland companies. Between 1971 and 1979, Colgan repeatedly and continuously purchased tool parts and repair services from the Black & Decker Company, which handled the billing and invoicing through its office in Towson, Maryland. The annual expenditure was anywhere from approximately \$2,300 in 1972 to approximately \$180 in 1977. Plaintiffs' Opposition to Motion to Dismiss of Colgan and Miller (hereinafter "Plaintiffs' Opposition") at 7. Miller conducted similar transactions with Black & Decker, but only in the amount of \$400 - \$500 a year. In 1974, Colgan sold \$471.63 worth of "computer forms" to the Arundel Asphalt Company in District Heights, Maryland. The plaintiffs also contend that Colgan was "transacting business" with the Rouse Company of Columbia, Maryland. Rouse had two construction projects in Florida and Ohio, on which Colgan worked as a subcontractor for the Lathrop Company.

Although Colgan had no contractual relationship with Rouse, the plaintiffs argue that "Colgan was intimately involved with Rouse in performing these projects." Plaintiffs' Opposition at 8.

The court finds that none of the two defendants' dealings with Black & Decker, Arundel Asphalt or Rouse was substantial enough to qualify as "transacting business." Colgan's link with Rouse is too indirect. A single sale of computer forms for just over \$400 is hardly continuous or substantial enough to justify subjecting Colgan to venue here. Although the Black & Decker purchases were more regular and longer-lived, their total value over a seven-year period was only about \$6,700 for Colgan and \$2,000 - \$3,500 for Miller. The total for the four years prior to the end of 1976, when the National Agreement was signed, was only about \$2,541. In short, the question whether venue is appropriate in Maryland as to defendants Colgan and Miller under § 12 of the Clayton Act depends on whether the corporations' purchases of services from NECA in Bethesda constitutes "transacting business" within the meaning of the statute.

The defendants cite *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1053 (E.D. Pa. 1969), for the proposition that active membership in a trade association whose head office is in a particular district is alone insufficient to establish venue in that district. *Id.* at 1055. In *Philadelphia Housing*, two corporate defendants moved to dismiss the antitrust actions against them on the grounds that venue was improper in the District of Columbia. The plaintiffs maintained that both defendants were active members of a trade association whose meetings they regularly attended in the District; that both had employed the association to perform services on the corporations' behalf; and that the president of one of the corporations had at one time served as an officer of the association. Judge Lord of the Eastern District of Pennsylvania found nothing in the corporations' relationship to the association that would constitute "transacting business" for venue purposes. *Id.* at 1055. Colgan

and Miller argue by analogy that because their purchases of services from NECA are part of their active membership in the association, those dealings cannot be characterized as business transactions.

The court agrees that it would be anomalous to confer venue as to a corporation merely because the corporation has joined a trade association headquartered in a given district. The court also agrees with Judge Lord's conclusion that mere attendance at a trade association meeting, or the fact that a corporation's president is an officer of the association, does not mean that the corporation "transacts business" in the association's home district. However, the facts of the present case are distinguishable from and more complex than those Judge Lord considered. Both Colgan and Miller expended somewhere in the neighborhood of \$44,000 between 1970 and mid-1977 for the services NECA provided. Each corporation considered its membership in the association to be a highly important aspect of its business activities, and took every opportunity to make that membership known to others. Robert Colgan, president of Colgan Electric, wrote an article in the *Electrical Contractor Magazine* (a NECA publication) in September, 1976, in which he averred that his company's investment in NECA was an investment in his business, the entire industry, and even in the country. Exhibit B to Plaintiffs' Opposition. In the same vein, H. E. Autrey, president of Miller, testified at his deposition that membership in NECA was the corporation's "total way of life in the construction industry." Autrey deposition at 55-56. The nature of the NECA services themselves indicates how intimately related they were to the conduct of the two corporations' business: NECA assisted in collective bargaining, marketing, public relations and political lobbying, among other services.

When a corporation regularly and continuously expends several thousand dollars a year to procure a wide variety of services which it deems integral to the conduct of its business, the corporation's affiliation with the association goes beyond the kind of membership discussed in *Philadelphia Housing*,

characterized only by attendance at meetings and service as an officer of the association.⁶ When the expenditures total at least \$44,000 for the seven years immediately preceding and during the formation of the supposedly illegal conspiracy, the transactions involved are "substantial" within the meaning of *United States v. Scopphony*, *supra*, 333 U.S. at 807. It is the continuity of the transactions and their importance to the companies, as well as the dollar amounts, which lead the court to conclude that both Colgan and Miller were and are "transacting business" with NECA within the meaning of 15 U.S.C. § 22. Furthermore, although many of the companies' dealings with NECA were through the local chapters, the court finds that both Miller and Colgan were in effect "transacting business" with national NECA in Bethesda, Maryland, as well as with the local chapters. The payments listed above went to the national headquarters in Maryland, in return for the services both companies prized very highly. Publications and other materials distributed through the local chapters were developed and produced at the association's national headquarters. Autrey deposition at 54-55; Colgan deposition at 72. It would be not only unrealistic, but also contrary to the liberal interpretation afforded § 22, to deny that the two companies' transactions with NECA were transactions with an association in the state of Maryland.

For all of the foregoing reasons, the court has concluded that venue will lie in this district as to both Colgan and Miller. The complaint therefore cannot be dismissed for lack of venue. The defendants' second ground for their motion to dismiss—that

⁶ Although the corporations in *Philadelphia Housing* were alleged to have employed the trade association there "to perform services on their behalf," 309 F. Supp. at 1055, there is no indication that the services were as extensive and/or considered as valuable as those offered by NECA. Furthermore, Judge Lord did not even address the allegation.

the complaint fails to state a claim on which relief can be granted—is similarly without merit.

A complaint will survive a motion to dismiss under Rule 12 (b)(6) of the Federal Rules of Civil Procedure “unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.” 2A *Moore's Federal Practice* ¶ 12.08 at 2274 (2d ed. 1970); *Conley v. Gibson*, 355 U.S. 41 (1957); *George C. Frey v. Pine Hill Concrete*, 554 F.2d 551 (2d Cir. 1977). The general test for adequacy of the pleadings under Rule 8 of the Federal Rules is whether the statement of the claim contains the required elements, stated plainly and succinctly, and whether it gives the opposing party fair notice of the nature and basis of the claim. 2A *Moore's Federal Practice* ¶ 8.17[1] (2d ed. 1979); *Conley v. Gibson*, *supra*; *Local 1852 v. Amstar Corp.*, 363 F. Supp. 1026 (D. Md. 1973), *aff'd*, 508 F.2d 839 (4th Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975). The more specific requirements for an allegation of conspiracy are that the pleader provide, whenever possible, some details of the time, place and alleged effect of the conspiracy; “[i]t is not enough merely to state that a conspiracy has taken place.” 2A *Moore's Federal Practice* ¶ 8.17[5] (2d ed. 1979); *Heart Disease Research Foundation v. General Motors*, 463 F.2d 98 (2d Cir. 1972); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 701-02 (E.D. Pa. 1973). Nevertheless, the pleader should be allowed considerable leeway, and the provision of further details may be left to discovery. 2A *Moore's Federal Practice* ¶ 18.17[5] at n. 5. On the whole, courts should be slow to dismiss an action on the pleadings, especially when antitrust violations are alleged. *Hospital Building Co. v. Trustees of Rex Hospital*, 511 F.2d 678 (4th Cir. 1975), *rev'd on other grounds*, 425 U.S. 738 (1976); *South Carolina Council of Milk Producers, Inc. v. Newton*, 360 F.2d 414 (4th Cir.), *cert. denied*, 385 U.S. 934 (1966); *Burch v. Goodyear Tire & Rubber Co.*, 420 F. Supp. 82 (D. Md. 1976), *aff'd*, 554 F.2d 533 (4th Cir. 1977).

In light of those principles of pleading, the court is satisfied that the plaintiffs' amended complaint gives a sufficiently clear

and succinct description of the alleged conspiracy, with enough details as to time and place, to give both Colgan and Miller notice of the basis of the claim against them. Although neither corporation is mentioned by name in the section of the complaint which describes the alleged antitrust violation in detail, paragraphs 4(e) and (f) of the complaint plainly assert that each corporation "has performed acts in furtherance of the conspiracies alleged herein." The more detailed explanation in paragraphs 20-25 provides ample notice of the time, nature and purported effects of the conspiracy. Although neither Colgan's nor Miller's precise role in the conspiracy is outlined, the discovery process is the proper tool for exploring such detail. In fact, discovery has revealed additional information which further convinces the court that the plaintiffs can show some set of facts, based the pleadings, that might entitle the plaintiffs to relief against Colgan and Miller. See Part V, *infra*.

Because a dismissal on the pleadings is unwarranted under the circumstances of this case, and because venue is proper in the District of Maryland as to both Colgan and Miller, the motion of those two defendants to dismiss the complaint as to them must be denied.

V. Plaintiffs' And Defendants' Cross-Motions For Summary Judgment On The Plaintiffs' Claims

The plaintiffs' motion for summary judgment on their own claims, as opposed to the defendants' counterclaims, seeks a declaratory judgment that Article Six of the NECA-IBEW National Agreement constitutes a *per se* violation of § 1 of the Sherman Act,⁷ in that the agreement amounts to a conspiracy to fix, maintain and stabilize the cost of contracts with the

⁷ Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

IBEW. The defendants' cross-motion seeks summary judgment on the plaintiffs' price-fixing allegations, on the grounds that the allegations fail to state a claim on which relief can be granted. In the court's view, the undisputed facts presented in the record show that the defendants' agreement to set up and implement the National Electrical Industry Fund *was* a price-fixing agreement illegal *per se*. The plaintiffs are entitled to summary judgment on that issue, and the defendants' cross-motion must be denied.

On any motion for summary judgment, the moving party must show that there are no genuine disputes as to any material fact, and that the movant is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467 (1962). See also *Fli-Back Co., Inc. v. Philadelphia Manufacturers Mutual Insurance Co.*, 502 F.2d 214, 218 (4th Cir. 1974). The starting point for an analysis of both the facts and the law in the present case is *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In *Socony*, the Court held:

Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*. [*Id.* at 223.]

. . .

. . . But that does not mean that both a purpose and a power to fix prices are necessary for the establishment of a conspiracy under § 1 of the Sherman Act. . . . It is the "contract, combination . . . or conspiracy in restraint of trade or commerce" which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. . . . In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the conspiracy embraced but a part of the interstate or foreign commerce in the commodity.

Id. at 225 n.59

A. The Agreement

The existence of an agreement between NECA and the IBEW is undisputed. It is rare in an antitrust case that the court need not construe a combination or conspiracy solely from the speeches, correspondence and meetings of the defendants. In the present case, the court has before it not only voluminous records of such speeches, correspondence and meetings, but also a copy of the exact terms of the defendants' agreement, reduced to writing and signed by representatives of NECA and the IBEW on December 8, 1976.

Although the fact of an agreement is undisputed, the application of the antitrust laws depends on *what* the defendants agreed to do. By its terms, Article Six of the National Agreement (quoted in Part I above) establishes the NEIF, and then provides that each individual employer will contribute to the fund 1% of his gross labor payroll every month. Most importantly, Article Six provides that the 1% payment obligation will be inserted into "[all] construction agreements in the electrical industry" (emphasis added). That language is critical, because it shows that the NEIF was to apply to *all* electrical contractors, and not just to those who were members of NECA or who were affiliated with NECA as nonmember signatories to Letters of Assent, Project Agreements or International Agreements.

The plain language of Article Six, indicating that *all* construction agreements were to be affected, is corroborated by the language of the National Agreement as a whole. The preamble states, "The *appropriate* contents of this agreement and the enabling clauses herein shall be inserted in all agreements between the parties and in all construction agreements between the Local Unions of the IBEW and the Local Chapters of NECA." (Emphasis added.) The preamble does not state unequivocally that *all* contents of the agreement will be inserted in only NECA-IBEW contracts. Articles Three, Four and Five, dealing with shift work, management rights and apprentice ratios, specifically provide that their language is to be inserted in agreements between local IBEW unions and

local NECA chapters, while the language is conspicuously missing from Article Six. That distinction, combined with the qualifying word "appropriate" in the preamble, demonstrates that the parties agreed to insert the NEIF provisions in *all* contracts without regard to NECA affiliation.

That conclusion is further buttressed by a document entitled "Basic Understandings and Interpretations of the IBEW-NECA Agreement," also signed on December 8, 1976 by Robert Higgins for NECA and Charles Pillard for the IBEW. The memorandum clarifies how each article of the National Agreement is to be interpreted and applied. Under Article Six, the document states that "the intent of this Article is to insert the industry fund contribution language in all IBEW construction agreements containing the NEBF language. . . ." An affidavit of Marcus Loftis, Administrative Assistant to the International President of the IBEW, explains which contracts contained the NEBF language. Mr. Loftis submitted the affidavit to the United States District Court for the District of Alaska on July 1st, 1977 in connection with *Case v. IBEW*, Civ. No. 77-65. Paragraph 7 of the affidavit states:

Since the inception of the pension benefit contributions in 1946, both the affiliated contributions in 1946, both the affiliated construction Locals and the electrical contractors, be they affiliated members of Chapters of NECA, members of other employer associations, or independent contractors, have always included within the terms of their collective bargaining agreements the one percent gross payroll benefit contribution to NEBF.

Exhibit 48 to plaintiffs' motion for summary judgment. If the reach of the NEIF was to be as extensive as that of the NEBF, it is clear that the language of Article Six was not subject to the limiting provisions of the preamble or the other articles of the National Agreement.

That interpretation is also supported by a letter from Henry H. Glassie to Robert L. Higgins, Executive Vice President of NECA, on October 7, 1976. Mr. Glassie is an attorney whom Higgins had consulted on the question whether NECA's adop-

tion and implementation of the National Agreement would require a formal amendment of NECA's bylaws. Mr. Glassie responded in his letter as follows:

If the Industry Fund provided for in Article 6 of the agreement referred to in Proposal #3 applied to NECA members as such, a change in the By-Law would be involved. However, we are informed the contribution to this fund as provided in Article 6 will be required of all union electrical contractors whether they are members of NECA or not-indeed would be applicable to a company after resignation from NECA; and moreover, that the contribution will not be required of non-union members of NECA. Accordingly, on balance, it is our opinion that the adoption of Ordinary Proposal #3 would not require the formality of an amendment of the By-Laws.⁸

There are other documents in the record which reinforce the conclusion that NECA and the IBEW intended to obtain NEIF payments from all electrical contractors employing IBEW labor. Among them are Exhibit 30 to the plaintiffs' motion, a letter dated October 26, 1976 from H. E. Autrey, then president of defendant Miller Electrical Company, to A. M. Scherffius of the E. I. duPont de Nemours Company; Exhibit 33, the November 1976 issue of Electrical Contractor Magazine; Exhibit 14, a NECA "Chapter Alert" dated December 20, 1976; Exhibit 28, a letter dated December 28, 1976 from

⁸ After the plaintiffs submitted the letter to the court, the defendants took Mr. Glassie's deposition in order to establish what he had intended to say in the letter. Before he was deposed, the defendants told Mr. Glassie that a letter he had written in 1976 was going to be interpreted as implying that non-members of NECA would be forced to pay into the NEIF. Glassie deposition at 34. Because the deponent was thereby "primed" to refute that interpretation, and because the deposition was taken some three and one-half years after the letter was written, the letter is still persuasive support for the fact that the defendants meant to insert the NEIF provision into *all* electrical industry construction agreements.

Charles Pillard to "All Local Unions Who Have Agreements Containing the 1% NEBVF Clause;" and Exhibit 31, a letter dated January 3, 1977 from Mark Hughes to Bernard Healey. The materials submitted by the defendants to support a different interpretation of Article Six are temporally far removed from the formation of the National Agreement itself, and are therefore so likely to be self-serving that in the court's view, they fail to create a genuine factual dispute.

B. Anticompetitive Purpose

Although it is clear *what* the defendants agreed to do, the question remains whether the purpose behind the agreement was to achieve some end forbidden by the antitrust laws. The plaintiffs contend that the NEIF provisions were designed to ensure that all electrical contractors employing IBEW labor would pay a higher price for procuring that labor, with the amount of the increase going to pay for industry services provided by NECA. The ultimate aim of the price manipulation, according to the plaintiffs, was to eliminate the competitive advantage in bidding which non-NECA contractors enjoyed by virtue of not having to include NECA dues in their cost of doing business. NECA was allegedly suffering from what the plaintiffs describe as a "Jehovah complex": the association felt it was providing valuable services to the entire electrical construction industry, and felt it was justified in compelling all the beneficiaries to pay for the services.

Because the crux of the plaintiffs' claim is an allegation of price-fixing, and because the plaintiffs allege that the price fixed was that of contracts with the IBEW, the court must decide the preliminary issue whether § 6 of the Clayton Act, 15 U.S.C. § 17, imposes a bar to the plaintiffs' action.

The first sentence of § 6 asserts that "[t]he labor of a human being is not a commodity or article of commerce."⁹ Ordinarily, the courts have interpreted that sentence to exclude from the antitrust laws any alleged restraints on the labor market itself. *Carroll v. Protection Maritime Insurance Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975); *Nichols v. Spencer International Press*, 371 F.2d 332 (7th Cir. 1967); *Kennedy v. Long Island Railroad Co.*, 319 F.2d 366 (2d Cir., cert. denied, 375 U.S. 830 (1963)). See also A. Cox, *Labor and the Antitrust Laws—A Preliminary Analysis*, 104 U. Pa. L. Rev. 252, 254 (1955). The primary rationale behind the court's interpretation is that Congress in § 6 meant to guarantee that the lawful activities of labor organizations would not be subject to the antitrust laws, and to that end, Congress excluded the labor market altogether as one in which trade could be restrained. 51 Cong. Rec. 14018 (1914). Consequently, there can be no antitrust violation unless some restraint on competition in a commercial market for goods or services is at issue. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Armco Steel Corp. v. UMW*, 505 F.2d 1129, 1134 (4th Cir. 1974); *Kennedy v. Long Island Railroad Co.*, *supra*, 319 F.2d at 373.

The defendants argue that the price of a contract for labor is indistinguishable from the price of labor itself, and that the plaintiffs' antitrust allegations therefore cannot survive application of § 6 of the Clayton Act. Although the court would

⁹ The full text of § 6 reads:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

ordinarily agree, the facts of this case make it possible to distinguish between the price or cost of labor and the price of procuring a contract for that labor.

Under most circumstances, the cost of labor is the amount an employer pays, *to the benefit of his employees*, in return for their services. The ultimate price of the labor may be broken down into several components, including wages, health care benefits, pension contributions and bonuses. Yet each component is a benefit to the employee, paid in exchange for his labor. Any supposed restraints on the determination of the aggregate price are not within the ambit of the antitrust laws, because the "item" whose price is involved is the labor of a human being.

In the present case, however, one element of the price electrical contractors were to be required to pay for IBEW labor was not to be paid to employees at all. NEIF contributions were to be paid directly into a fund controlled wholly by NECA and set up for the purpose of financing NECA's services. The benefits flowing from the payments were to go to *employers* in the industry, whether or not the employers would otherwise want the benefits or choose to purchase them. In no sense does Article Six of the National Agreement reflect an amount that IBEW laborers charge *for their labor*. It instead represents a charge which an employer group and the union agreed *all* employers in the electrical construction industry would have to pay, in addition to employee compensation, in order to procure a contract with the IBEW. In the court's view, the price of a labor contract under those circumstances is distinguishable from the price of labor itself, and might therefore be subject to illegal manipulation.

Nevertheless, the distinction would be irrelevant if the plaintiffs were alleging an illegal restraint on the labor market itself. In other words, if the plaintiffs claimed that manipulation of the cost of procuring labor interfered with their freedom or ability to hire workers, the court would have no trouble dismissing the claims on the authority of *Kennedy v. Long Island Railroad*, *supra*, *Apex Hosiery*, *supra*, and *Armco*

Steel, supra. In the instant case, however, the heart of the complaint is the alleged restraint on competition in the market for electrical construction services. Those services are clearly within a commercial market subject to the antitrust laws. Because of the combination of circumstances here—the price of a labor contract is distinguishable from the price of labor and the plaintiffs do not allege any restraint on competition in the labor market itself—the court finds that § 6 of the Clayton Act is no bar to the present action.

In order to link the alleged manipulation of the price of labor contracts with the alleged restraint on competition, and in order to determine that Article Six of the National Agreement constitutes a price-fixing conspiracy illegal *per se*, the court must be satisfied that there is no genuine factual dispute as to the defendants' anticompetitive purpose in establishing an implementing the NEIF. *United States v. Socony, supra*, 310 U.S. at 223; *United States v. National Society of Professional Engineers*, 555 F.2d 978, 983 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978); *State of Arizona v. Cook Paint & Varnish Co.*, 391 F. Supp. 962, 965-67 (D. Ariz. 1975), *aff'd*, 541 F.2d 226 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

The plaintiffs take the position that the "NECA defendants"—that is, all defendants except the IBEW and Charles Pillard—conceived of the NEIF as a means to eliminate the competitive bidding advantage non-NECA-members enjoyed by virtue of not having to pay NECA dues to support the association's services to the industry. By ensuring that every contractor in the electrical construction industry employing IBEW labor¹⁰ contributed to the cost of NECA

¹⁰ The IBEW is virtually the only union in the country to have organized workers in the electrical construction industry. Almost every union job in the industry employs IBEW labor. Plaintiffs' Memorandum in Support of Motion for Determination of This Suit as a Class Action, at 7-8.

services according to a defined formula, the NECA defendants allegedly sought to equalize every contractor's cost of doing business and destroy the non-NECA-members' competitive advantage. In order to implement the plan, NECA enlisted the help and bargaining power of the IBEW, which agreed to the scheme as a concession to management, in return for the advantageous provisions of the National Agreement concerning pension benefits, shift work and apprentice ratios.

The record reveals that there is not genuine factual dispute over the accuracy of the plaintiffs' contentions. One of the most compelling portions of the record is the transcript of a speech made by Robert Colgan, then President of NECA, to the District 1 NECA Council meeting at Sutton, Massachusetts on September 10, 1976. Although NECA and the IBEW had announced their proposed agreement in the spring of 1976, it could not become official until approved by the local chapters. Accordingly, Colgan and other NECA officials traveled around the country in the summer and fall of 1976, meeting with the local chapters and encouraging them to approve the agreement.

In his September 10th speech in Massachusetts, Colgan discussed how the insertion of the NEIF into collective bargaining agreements would eliminate non-NECA contractors' cost advantage:

I don't want a national constructor going to our customers and say I have an international agreement and I can employ your people, or I can employ IBEW people and *I have an advantage over them because I don't have to pay any percentage on top of my payroll*. Now many of you say who's going to assure that the national constructors will pay this bill. It isn't a hundred percent positive that the national constructors will pay this bill, but they have international agreements with the very people that we're negotiating this agreement with, and in the majority of the cases they agree to operate under the terms of the local bargaining agreement, and by the way this is if it becomes part of a bargaining agreement this is a legal industry fund and it has been put to the test before it was ever [sic] put into this proposal. I'm saying that I think that the work

that we have done over the years deserves somebody else who's getting the benefits from it to help pay for the way that we have helped this industry grow. *I have all of my life I have always resented those people who felt it was an opportunity for them to remain on the outside to employ IBEW people and say I don't have to pay that bill, if you get a NECA contractor it's going to cost you more money.* I want that in the bargaining agreement and as you all know most of it is in the bargaining agreement. I want it in the bargaining agreement because so that the people who agree to operate by the local agreements will abide by that agreement. That's the way I feel about it. That is part of the dream that I have and I will admit there are going to be if it would be passed and I know many of you have taken votes against it. If it were passed it will be put to the test, but in general you will find that the people are willing to accept the other conditions that they get with this along with abiding by the local agreements. *I think it's an advantage to you as contractors to stabilize your industry in this manner.* I realize that no one can come out and compete against the non-union rates but they can compete against some of the conditions that non-union people will be able to operate under better able to operate under. I firmly believe that we can get closer to them and closer to our customers if we do some of the things they have been complaining about. And yet they are the very same people that are telling us that we are raising their cost. I do not believe we are raising their costs. *I believe we are putting an adder on top of what their effective lower cost is.*

Exhibit 7 to Plaintiffs' Motion for Summary Judgment at 6-7 (emphasis added). As the record makes clear, the "adder" was to be applied to *all* contractors with the IBEW, not just contracts negotiated between NECA and the union.

The anticompetitive purpose so apparent in Mr. Colgan's speech is further documented by affidavits submitted and statements of counsel made in connection with some of the collection cases pending in other courts. Each of three affidavits sworn to by NECA chapter managers contained the

following explanation of the necessity for collecting NEIF payments:

Over the years of my association with the electrical contracting industry, I have frequently seen situations where the difference between the successful bid for a contract and the next lowest bid was much less than 1% of the successful contractor's anticipated payroll expenses for the project. This is because material and labor costs vary little between competing contractors. If the Howard P. Foley Company and other contractors are permitted to evade payment of 1% of their payroll costs to the NEIF they will, thus, be placed in a highly unfair competitive position with respect to other contractors who continue to observe their contractual obligation in this regard.

Exhibits 2, 3 and 4 to Plaintiffs' Motion for Summary Judgment, at pages 5, 4 and 4-5 respectively.

At a hearing in a collection case in the Federal District Court in Los Angeles, counsel for the NEIF, Stanley Tobin, insisted that the 1% payments required under Article Six could have a decisive effect on a contractor's competitive bidding advantage.

MR. TOBIN: . . . What is important here, your Honor, is that these national contractors [who refuse to pay into the NEIF] . . . are going to get an extra boost. *They are going to be able to be so competitively placed that they have an advantage over the local contractors, members of the local [NECA] chapter.* They will not have to pay pending all this litigation which can go on for years in Maryland. They will not have to pay one cent towards this fund which every other contractor here will have to pay.

* * *

MR. TOBIN: . . . That is exactly the point. In the interim *[the contractor refusing to pay] is getting a competitive advantage over everyone else. He, therefore, gets the bids. He can beat them out.* There is nothing that anybody can get from it thereafterwards. We are coming in here merely for his allowance. That is number one.

Number two, and perhaps even more important, he doesn't pay his competitors—the hundreds and hundreds

of other electrical contractors that are situated in Southern California—they see he gets away with that one percent. *That one percent is a big thing.*

Exhibit 5 to Plaintiff's Motion for Summary Judgment at 8, 12 (emphasis added).

The undisputed facts discussed so far establish that NECA and the IBEW entered into a written agreement to add a surcharge, determined by a uniform formula, to the cost of procuring *all* contracts with the IBEW in the electrical construction industry. The facts also establish that the purpose of the agreement was to eliminate competition between NECA members and non-NECA-members in bidding for projects in the industry. In the court's view, those facts are sufficient to establish a price-fixing scheme which is *per se* illegal under the line of authority rooted in *United States v. Trenton Potteries*, 273 U.S. 392 (1927), expressed most clearly in *United States v. Socony*, *supra*, and reaffirmed in cases such as *United States v. Container Corporation of America*, 393 U.S. 333 (1969); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); and *Catalona, Inc. v. Target Sales, Inc.*, ___ U.S. ___, 100 S.Ct. 1925 (1980). In order to clarify its view, the court will address some of the defendants' arguments that there has been no *per se* violation of

C. The Defendants' Arguments

1. Applicability of the *per se* rule

One of the defendants' arguments is that the conduct of NECA and the IBEW alleged to be illegal does not fall within any of the categories the courts have already deemed to be *per se* violations of the Sherman Act. There are two parts to the argument: First, the National Agreement cannot amount to a price-fixing conspiracy illegal *per se* because it is neither a horizontal agreement between competitors nor a vertical agreement between links in a chain of distribution; and second, the court needs to know more about the actual effect of the National Agreement on competition before the court can determine whether the arrangement should be classified as a *per*

se violation. *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963); *Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1192 (3d Cir. 1976); *cert. denied*, 433 U.S. 908 (1977). The defendants conclude that if the scheme were tested under the standards set out in *Northern Pacific Railroad Co. v. United States*, 356 U.S. 1 (1958), it would not warrant *per se* treatment, but would instead have to be analyzed under the Rule of Reason.¹¹

The court is not persuaded that an arrangement designed to fix the price of procuring labor contracts cannot be a *per se* illegal price-fixing agreement merely because it is neither horizontal nor vertical in the traditional sense. In the three district court cases cited by the defendants, the courts rejected the *per se* price-fixing theories not just because the agreements at issue were neither horizontal nor vertical, but because there was no indication of any interference with free market forces through price manipulation.¹² In the present case, on the other hand, the ultimate purpose of the National Agreement was to interfere with the price NECA members' competitors could charge for their services. By putting an "adder" on the competitors' cost of procuring labor, NECA through its agreement with the IBEW aimed to stabilize operating costs in the industry and thereby eliminate bidding competition.

¹¹ In *Northern Pacific*, the Supreme Court explained the principle of *per se* unreasonableness as follows:

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. 356 U.S. at 5.

¹² *West Texas Utilities Co. v. Texas Electric Service Co.*, 1979-2 TC ¶ 62,851 at 78,921 (N.D. Tex. 1979); *Mortenson v. First Federal Savings & Loan*, 79 F.R.D. 603 (D.N.J. 1978); *DuPont Glare Forgan, Inc. v. A T & T*, 437 F. Supp. 1104, 1127-28 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978).

The case of *United States v. General Motors Corp.*, 384 U.S. 127 (1966), makes it clear that it is such *restraint on price competition*, rather than the characterization of an agreement as horizontal or vertical, which is the essence of a *per se* violation. In *General Motors*, three associations made up of franchised Chevrolet dealers in the Los Angeles area enlisted General Motors' help in eliminating a practice whereby other Chevrolet dealers worked with discounters to sell cars to the public at prices well below what dealers normally charged their customers.

The Court said there could be no doubt that the *effect* of the combination between General Motors and the dealer associations was to restrain trade. The Court continued:

We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy. *E.g.*, *United States v. Parke, Davis & Co.*, 362 U.S. 29, 47; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223. And the *per se* rule applies even when the effect upon prices is indirect. *Simpson v. Union Oil Co.*, 377 U.S. 13, 16-22; *Socony-Vacuum Oil Co.*, *supra*.

There is in the record ample evidence that one of the purposes behind the concerted effort to eliminate sales of new Chevrolet cars by discounters was to protect franchised dealers from real or apparent price competition. . . .

The protection of price competition from conspiratorial restraint is an object of special solicitude under the anti-trust laws. We cannot respect that solicitude by closing our eyes to the effect upon price competition of the removal from the market, by combination or conspiracy, of a class of traders. Nor do we propose to construe the Sherman Act to prohibit conspiracies to fix prices at which competitors may sell, but to allow conspiracies or combinations to put competitors out of business entirely.

384 U.S. at 147-48.

Nowhere in its opinion did the Court even imply that price competition deserved "special solicitude" only when the

alleged restraint was clearly horizontal or vertical. Nor did the Court consider it important to characterize the particular combination at issue, which had some horizontal elements (dealers combining with other dealers), some possibly vertical elements (franchisees combining with franchisor), and some highly unusual elements. As long as the price restraint was clear, the particular method of implementing it was not important. See *United States v. Socony*, *supra*, 310 U.S. at 222 (agreements to raise or lower prices would be illegal "whatever machinery for price-fixing was used"); *United States v. Container Corporation of America*, *supra*, 393 U.S. at 337.

Like the Supreme Court in *General Motors*, this court does not believe it can close its eyes on the defendants' clear purpose to restrain price competition. It is true that the National Agreement may not fall neatly into the most familiar molds of price-fixing agreements. In that vein, the defendants cite *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), in support of their argument that a business arrangement should not be placed in a *per se* category before the courts have gained considerable familiarity with the arrangement's effects and possible advantages. However, in *Broadcast Music*, the Court was dealing with blanket licensing for musical compositions protected by the copyright laws. The activities alleged to be illegal involved practical problems peculiar to the market for musical compositions. 441 U.S. at 10-16. Because the Court had some doubt that blanket licensing *facially* appeared to restrict competition or competitive pricing, the Court declined to apply the *per se* rule. In contrast, this court has little difficulty concluding that the collaborative effort by members of NECA, through their association, to enlist the aid of the IBEW in implementing a designedly anticompetitive scheme is the kind of horizontal concerted activity recognized under § 1 of the Sherman Act as particularly dangerous to price competition. The Court therefore remains persuaded that Article Six of the National Agreement is *per se* illegal.

2. Coercion or imposition

The *Broadcast Music* case gives rise to another argument the defendants have made repeatedly in response to the allegations that Article Six amounts to *per se* illegal price-fixing. The theory is that the plaintiffs can prove no violation unless they establish that the defendants coerced the plaintiffs into accepting the NEIF provisions, or imposed upon the plaintiffs a contract containing the industry fund. The defendants rely principally on the Supreme Court's finding in *Broadcast Music* that the plaintiff had a "real choice" between obtaining a blanket licenses from the composers themselves. Partly because those alternatives were available, the Court declined to categorize the blanket licenses as *per se* illegal.

That rationale in *Broadcast Music*, as well as the reasoning in the other cases cited by the defendants, is not applicable to the present case. The Supreme Court in *Broadcast Music* did not elaborate on the implications of "choice" other than to say its presence was one of several reasons not to find a *per se* violation under the circumstances. As this court has already pointed out, *Broadcast Music* involved a highly unusual fact situation. The most clearly distinguishing fact in the present case is the existence of a clear, written agreement to manipulate prices, with the equally clear intent of eliminating competition from non-NECA contractors. It is the agreement itself, entered into with an anticompetitive purpose, which is illegal under the Sherman Act. The possibility that the IBEW would, if pressed, negotiate separate collective bargaining agreements without the NEIF provision cannot change the illegal character of the undisputed conspiracy between the IBEW and NECA.

The existence of the conspiracy also distinguishes the present case from *Iodice v. Calabrese*, 345 F. Supp. 248, 268 (S.D.N.Y. 1972), *modified*, 512 F.2d 383 (2d Cir. 1975), in which the district court found that there was no agreement between the union and the contractors' association requiring the union to secure certain terms in all its collective bargaining agreements. Here the IBEW *did* agree to insert the NEIF

provision in *all* construction agreements in the industry. In short, the court rejects the theory that a showing of coercion or imposition is a prerequisite to proving a *per se* illegal price-fixing arrangement.¹³

3. Anticompetitive effect

Another argument the defendants raise in order to rebut the plaintiffs' contentions is that there can be no finding of a violation absent a showing of the anticompetitive effect of the NEIF provisions. It is clear that where price-fixing is concerned, the antitrust violation inheres in the agreement itself and in its illegal purpose; the very function of the *per se* rule is to obviate an exhaustive inquiry into the effects of price-fixing in each individual case. *United States v. Socony*, *supra*, 310 U.S. at 222; *National Society of Professional Engineers v. United States*, *supra*, 435 U.S. at 692; *Northern Pacific Railroad Co. v. United States*, *supra*, 356 U.S. at 5;¹⁴ Sullivan, Handbook of the Law of Antitrust § 71 at 194-95 (West 1977) (hereinafter "Sullivan"). As the Fourth Circuit recently stated in *United States v. Society of Independent Gasoline Marketers of America*, 1977-2 Trade Cases ¶ 61,753 (4th Cir. 1979).

Since in a price-fixing conspiracy the conduct is illegal *per se*, further inquiry on the issues of intent or the

¹³ The majority of the cases the defendants cite in support of their "coercion" theory involve illegal boycotts or refusals to deal. The element of coercion inherent in those cases is simply not an issue in a price-fixing case. See *In Re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

¹⁴ In 356 U.S. at 5, the Court said:

... This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

anticompetitive effect is not required. The mere existence of a price-fixing agreement establishes the defendants' illegal purpose since "[t]he aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1926).

The defendants correctly point out that the cases deeming inquiry into anticompetitive effect unnecessary are criminal cases brought by the government, and that the prerequisites for a plaintiff's recovery in a civil case are somewhat different. Part II of this opinion recognizes that a civil plaintiff has no standing to sue unless it can show direct injury to its business or property, 15 U.S.C. § 15, or threatened loss or damage, 15 U.S.C. § 26, proximately caused by a violation of the antitrust laws. The defendants argue that the plaintiffs cannot show the requisite harm or threat unless they prove the anticompetitive effect of the National Agreement on the electrical construction industry.

In the court's view, the defendants misconstrue the burden of proof on a civil plaintiff in an antitrust case. Although the crux of a private action is individual injury, *Windham v. American Brands*, 565 F.2d 59, 66 (4th Cir. 1977), cert. denied, 435 U.S. 968 (1978), there is no requisite that the injury be shown by proving the anticompetitive effect of the defendants' agreement. The proof required will depend on the injury alleged. See P. Areeda, *Antitrust Analysis, Problems, Text, Cases* ¶ 159 (2d ed. 1974 and Supp. 1978) (hereinafter "Areeda"). The essential prerequisites to recovery are that the plaintiff's injury be causally related to the activity which violates the antitrust laws, and that the injury be "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977).¹⁵ In a price-fixing case,

¹⁵ In *Brunswick*, the court went on to say, "The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." 429 U.S. at 489.

the measure of the plaintiff's injury may be the full amount of the "overcharge;" that is, the difference between the fixed price and the price that would otherwise have prevailed. *Phillips v. Crown Central Petroleum Corp.*, 395 F. Supp. 735, 768 (D. Md. 1975); *Wall Products Co. v. National Gypsum Co.*, 357 F. Supp. 832, 844 (N.D. Calif. 1973); *Ohio Valley Electric Corp. v. General Electric*, 244 F. Supp. 914, 933 (S.D.N.Y. 1965); Sullivan, § 251 at 785-86; Areeda, ¶ 159 at 70-71. See also *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979). Although determining what the price would have been absent a conspiracy may require some speculation, a wrongdoer should not be permitted to invoke the uncertainty created by his own wrong and use it to preclude a plaintiff's recovery. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264-65 (1946); *Ohio Valley Electric v. General Electric*, *supra*, 244 F. Supp. at 933-34.

In the present case, the plaintiffs claim that their injury is the amount of the contributions they have paid into the NEIF; and that their threatened loss or injury is their as yet unfulfilled obligation to pay into the fund. That injury is causally related to the defendants' illegal agreement, and flows from that which makes the defendants' conduct unlawful, namely the addition of a 1% "adder" on the cost or procuring IBEW contracts. The amount of the overcharge is ascertainable without unreasonable speculation, because it is expressed in terms of a percentage of employer payroll. The defendants claim it is practically impossible to estimate what the terms of collective bargaining agreements would have been absent the NEIF, and that it is therefore equally difficult to calculate any overcharge. But to allow that argument to prevail would be to ignore the principle of *Bigelow* stated above. In short, the

That language, however, was particularly applicable to the facts of the *Brunswick* case, which involved alleged violations of the anti-merger provisions of the Clayton Act, and not alleged price-fixing violations.

plaintiffs have made an adequate showing of the *fact* of their injury stemming from the defendants' conduct. There is therefore no need for proof of the anticompetitive effects of Article Six of the National Agreement.¹⁶

4. The labor exemption

A fourth argument which the defendants raise in order to show there has been no *per se* violation is that the agreement between NECA and the IBEW falls within the "labor exemption" from the antitrust laws. Although rooted in the Norris-LaGuardia Act,¹⁷ and §§ 6 and 20 of the Clayton Act,¹⁸ the exemption is non-statutory, developed by the courts in an effort to balance the national labor policy against the apparently conflicting antitrust policy. The central question is when the activities of a labor union are to be construed as a violation of the antitrust laws.

The exemption first began to take shape in *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), in which the Supreme Court said:

[A]n elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act.

310 U.S. at 503-04. In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Court considered "[W]hether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs" was within the *statutory* exemp-

¹⁶ The actual amount of each plaintiff's damages must be determined at future proceedings.

¹⁷ 29 U.S.C. §§ 104, 105 and 113.

¹⁸ 15 U.S.C. § 17 and 29 U.S.C. § 52.

tion of § 20 of the Clayton Act. *Id.* at 227. Justice Frankfurter wrote:

So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted; emphasis added).

The problem of a union combining with non-labor groups arose directly in *Allen Bradley Co. v. Local 3, IBEW*, 325 U.S. 797 (1945). Electrical contractors, electrical equipment manufacturers and the union had engaged in concerted activity to assure that the contractors would purchase only equipment manufactured in the New York City area, and that manufacturers would sell their equipment in New York City only to contractors employing IBEW labor. There was no question that the union's aim in participating in the combination was to pursue its own interests and those of its members. *Id.* at 799-800. After reviewing the history of the tension between the antitrust laws and Congress' labor legislation, the Court framed its analysis in these terms:

The result of all this is that we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.

Id. at 806.

Having decided that the union's activities, if taken alone, would not violate the Sherman Act, and that the contractors' and manufacturers' activities, absent union participation, would violate the Act, the Court concluded that a union could not legally aid and abet businessmen who were committing antitrust violations. "Congress never intended that unions

could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." *Id.* at 808. "A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.* at 811.

The next cases to develop the labor exemption were *Pennington v. UMW*, 381 U.S. 657 (1965), and its companion case, *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). In *Pennington*, the Court considered the question whether a union could agree upon certain wage terms with a multi-employer bargaining unit and then agree with the employer group to seek the same wage terms from employers outside the unit. The complaint alleged that the union had entered into a conspiracy with large mine operators to impose agreed-upon wage scales on smaller, nonunion operators regardless of their ability to pay, with the purpose of driving the smaller companies out of business.

The Court found that the union's activity was not exempt from the antitrust laws.¹⁹ Justice White wrote:

We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from employers. No case under the antitrust laws could be made out on evidence limited to such union behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the

¹⁹Justice White wrote the "opinion of the Court," joined by two other Justices. Justice Douglas wrote a concurrence joined by Justices Black and Clark; Justice Goldberg and two other Justices concurred in the result but dissented from the Court's opinion.

union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

381 U.S. at 665-66 (footnote omitted). After weighing the concerns of the antitrust laws with the relevant labor policies, Justice White's group concluded that the agreement to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws. *Id.* at 669.²⁰

In *Jewel Tea*, however, *Pennington's* companion case, the Court found that the agreement at issue *was* exempt from the antitrust laws.²¹ The unions had obtained an agreement from a multi-employer bargaining group concerning marketing hours for food store meat departments. The unions then sought and obtained the same terms from an employer outside the bargaining group, but did so because the unions believed the terms would serve the unions' own best labor interests. They had not agreed with the employers in the bargaining group to seek the same terms from any other employer. 381 U.S. at 688. The Court defined the issue in the case to be

whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provision through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor

²⁰ Justice Douglas' opinion differed from Justice White's primarily in that it said a union would be liable for an antitrust violation if the union's agreement with the employers "was made for the purpose of forcing some employers out of business." 381 U.S. at 673. The issue of predatory intent is discussed in more detail, *infra*.

²¹ The Court split into the same three groups of three as in *Pennington*, with White writing the Court's opinion, Goldberg concurring only in the judgment, and Douglas dissenting.

policy and is therefore exempt from the Sherman Act. We think that it is.

Id. at 689-90 (footnote omitted).

The Court's most recent treatment of the labor exemption was in *Connell Construction Co. v. Plumbers & Steamfitters Local #100*, 421 U.S. 616 (1975). The respondent union was party to a collective bargaining agreement with a group of mechanical contractors in Dallas. With the goal of organizing as many plumbing and mechanical subcontractors as possible, the union sought to have general contractors working in Dallas sign an agreement under which they would award subcontracts only to companies whose employees the union represented. If a general contractor refused to sign, the union picketed the company. At no time did the union represent or seek to represent the employees of the companies it picketed.

The Court concluded that the agreements between the union and the general contractors were not exempt from the antitrust laws.

This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.

421 U.S. at 625.

Any application of the leading Supreme Court labor exemption cases to the facts of the present case must be done in light of the recent Fourth Circuit decision in *Smitty Baker Coal Co., Inc. v. UMW*, 620 F.2d 416 (4th Cir. 1980). In *Smitty Baker*, the Fourth Circuit set out the requirements for proving an antitrust violation in what the court called a "*Pennington-type case*." Emphasizing the distinction between the applicability of

the labor exemption and the actual existence of an antitrust violation, the court said:

To repeat: it is not enough that the Union may have entered into a contract with a multi-employer unit in a national industry to establish an antitrust violation by the Union or, for that matter, the employer-group. That may in some cases take the action out of the exemption enjoyed by labor but it will not *per se* amount to an antitrust violation. To amount to an antitrust violation the agreement must be rooted in an anti-competitive purpose, and must effect an anti-competitive result, as evidenced by action "ruining" a competitor's business or driving him "out of business." Unless there is such an agreement between the labor organization and the non-labor group and such an anti-competitive result, there is no conspiracy actionable under the antitrust laws.

620 F.2d at 431-32.

The defendants argue that the language quoted above precludes any finding that the National Agreement violated the antitrust laws. However, the Fourth Circuit's opinion must be analyzed in two parts: first, for what it says about the labor exemption, and second, for what it says about actual proof of a violation. That two-part analysis will show that the defendants do *not* fall within the exemption, and that the National Agreement amounts to a *per se* violation of § 1 of the Sherman Act as a matter of law.

The court in *Smitty Baker* did not focus its attention on interpreting the labor exemption. Because the court concluded that there had been no conspiracy which would amount to a violation, the applicability of the exemption was not brought directly into issue. Accordingly, the case does not shed any new light on the question at the heart of the labor exemption: under what circumstances does the national labor policy outweigh the national antitrust policy, and dictate that an agreement which would otherwise run afoul of the Sherman Act be held immune from the provisions of that Act?

Smitty Baker instead concentrates on what a plaintiff must prove in order to make out an antitrust violation in a "*Pennington*-type case," focusing on the requirement of

predatory intent. This court is satisfied that as the Fourth Circuit defined in the *Pennington* model in *Smitty Baker*, the present case does not fit the mold, and is therefore not subject to the same requirements of proof. The model is described as follows:

[The *Pennington*] doctrine requires (a) an agreement between the Union and an employer-group consisting of a substantial number of the larger employers in an industry to establish a wage scale for the employees-of-the-group-members-of-the Union, (b) which wage scale the Union and the employer group knew that the marginal employers in the industry could not afford, and (c) which wage scale the Union undertook to impose on the marginal nonmember operators, (d) with the intent to drive these marginal operators out of business and to remove them as competitors of the employer-group. And this is the view of the *Pennington* model as taken in other decisions and as expressed by commentators.

620 F.2d at 432-33. The court then noted that the model *had to* be so defined in order to avoid making a mockery of the statutory labor exemptions.

The facts of the case at bar do not require application of the "*Pennington* doctrine" as the Fourth Circuit has defined it. The agreement between the IBEW and NECA has nothing to do with a wage scale, but instead concerns an industry fund whose proceeds were to benefit only NECA and the willing and unwilling recipients of NECA services. While the determination of a wage scale is a central and intimate concern of organized labor, promotion of an employer-oriented industry is not. As *Smitty Baker* teaches, a union's activities concerning wages deserve special solicitation under the national labor policy, and special safeguards against unwarranted application of the national antitrust policy. The same is not necessarily true of a union's agreement to assist an employer in implementing an intentionally anticompetitive scheme.

Unlike the plaintiff in *Smitty Baker*, the plaintiffs here have shown a clear, unequivocal agreement between the union and the employer group, and have demonstrated that the purpose

of the agreement was to eliminate competition between NECA and non-NECA contractors in the electrical construction industry. This court cannot read *Smitty Baker* to hold that a union can *never* be liable under the antitrust laws unless the requirements of the *Pennington* doctrine are met. Where, as here, the plaintiff has made out a *per se* § 1 violation under the *Socony* doctrine and has demonstrated the defendant's anticompetitive purpose; and where, as here, the union activities in question do not directly involve wages or other terms and conditions of employment;²² the union's liability must depend on the application of the non-statutory labor exemption to the particular facts involved.

Taking the Supreme Court's definitions of the nonstatutory exemption as a whole, as they are expressed in the cases discussed at pp. 41-44, *supra*, it appears to this court on balance that the policies behind the antitrust laws must take precedence over whatever labor considerations are involved in the present case. In *Hutcheson*, *supra*, 312 U.S. at 232, the Court noted that the exemption applied so long as the union acted in its self-interest and did not combine with non-labor groups; here the IBEW has combined with an employer group to promote an industry fund which was not designed to serve union interests. In *Allen Bradley*, *supra*, 325 U.S. at 808 and 811, the Court condemned union participation in the creation of business monopolies and in the control of marketing goods and services; here the IBEW threw its weight behind what was in essence a business group's scheme to control the marketing of

²² The defendants argue that Article Six of the National Agreement is related to employment conditions because it represents a union concession to management in return for increased pension benefits, a shift clause and an apprentice ratio. If the court accepted that argument, any union undertaking would enjoy antitrust immunity as long as it was contained in a collective bargaining agreement. The court knows of no basis for so broad a holding.

electrical construction services. In *Pennington*, *supra*, 381 U.S. at 665-66, Justice White found that a union forfeited its exemption when it agreed with one employer to seek the same wages, hours or other employment conditions from other employers; here the IBEW agreed to require the NEIF language in *all* contracts in the electrical construction industry. As this court has already noted, the National Agreement is even more susceptible to the antitrust laws than the agreement in *Pennington*, because Article Six does not concern wages or other terms and conditions of employment. It instead concerns the price of contracts with the IBEW, and bidding competition in the industry. In *Jewel Tea*, *supra*, 381 U.S. at 689-90, the Court made it clear that prices were *not* intimately related to wages and working conditions.²³ It is a fair inference from *Jewel Tea*, *supra*, 381 U.S. at 690, that the IBEW's agreement to obtain the NEIF provision from non-members of NECA, at the behest of an in combination with NECA, does not fall within the protection of the national labor policy, and is therefore not exempt from the Sherman Act. The Court's language in *Connell*, *supra*, 421 U.S. at 625, is applicable here: the NECA-IBEW agreement is the kind of direct restraint on the business market, whose potential anticompetitive effects "would not follow naturally from the elimination of competition over wages and working conditions."

In short, the IBEW's role in agreeing to implement Article Six of the National Agreement raises no labor policy issues important enough to outweigh the strong, unequivocal policy embodied in the Sherman Act and in the line of cases beginning with *United States v. Socony-Vacuum Oil*, condemning price-fixing agreements as *per se* illegal.

²³ As the Court explained more fully in *American Federation of Musicians v. Carroll*, 391 U.S. 99, 113 (1968), the question is whether an agreement is "intimately bound up with the subject of wages," even if in *form* the agreement concerns prices. This court remains persuaded that the NEIF provision had nothing to do with wages.

D. Conclusion

For all the foregoing reasons, the court has concluded that it must grant the plaintiffs' motion for summary judgment, and declare Article Six of the National Agreement illegal *per se*. For the same reasons, the defendants' motion for summary judgment on the plaintiffs' motion, the court is mindful of the cases from both the Supreme Court and the Fourth Circuit holding that summary judgment is often inappropriate in antitrust cases, where "motive and intent play leading roles," or where "the issue of intent relates to an ambiguous contract or document." *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962); *Morrison v. Nissan Motor Co.*, 601 F.2d 139 (4th Cir. 1979); *Cram v. Sun Insurance Office*, 375 F.2d 670 (4th Cir. 1967). However, it is clear that the summary judgment motion has a place in antitrust cases. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968); *White Motor Co. v. United States*, 372 U.S. 253, 259 (1963). In the present case, the court has considered voluminous briefs and documents, and has heard several days of oral argument on the summary judgment motions. The written and oral presentations have raised no issue which the court considers a genuine dispute as to a material fact: the existence of the National Agreement is undeniable, and its purpose is clear from the language of the agreement itself as well as from the contemporaneous documents. In the court's view, it is therefore appropriate to declare Article Six of the agreement illegal as a matter of law.

VI. Plaintiffs' Motion For Class Certification

Plaintiffs Commonwealth Electric Company (Commonwealth) and the Howard P. Foley Company (Foley) seek to have the present case certified as a class action on behalf of a class of plaintiffs defined as follows:

All electrical contractors which, since July 1, 1977, (a) are not members of the National Electrical Contractors Association or its chapters and (b) have performed electrical construction work using electrical workers obtained

and employed under the terms of "Inside" or "Outside" collective bargaining agreements with local unions affiliated with the International Brotherhood of Electrical Workers, AFL-CIO, which agreements contain or incorporate by reference the provisions of Article Six of the NECA-IBEW National Agreement.

Commonwealth and Foley are the purported representatives of the class.

A motion for class certification is governed by Rule 23 of the Federal Rules of Civil Procedure. In order to prevail, the movant must show that all the requirements of Rule 23(a) are met, and that the requirements of part 23(b)(1), (b)(2) or (b)(3) are met as well. Commonwealth and Foley maintain that class certification is appropriate in this case under either 23(b)(2) or 23(b)(3). Accordingly, the pertinent provisions of Rule 23 are these:

(a) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

...

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The

matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Having tested the requirements of Rule 23 against the arguments of all the parties, the court has concluded that certification of the class as the plaintiffs have defined it would be appropriate under Rule 23(b)(3). The court will address each requirement in turn, and explain how the plaintiffs have demonstrated their compliance with each one.

A. Numerosity

By the plaintiffs' estimation there are approximately 7,800 electrical contractors which fall within the defined class. That number results from a comparison between the "IBEW Agreement Files," which identify all electrical contractors bound by collective bargaining agreements containing the NEIF provision, and the NECA membership list. Exhibit X to the plaintiffs' motion for class certification. The plaintiffs have therefore shown with adequate specificity that the class members are too numerous to make joinder practicable. *Cf. In re Independent Gasoline Antitrust Litigation*, 79 F.R.D. 552 (D. Md. 1978); *Predmore v. Allen*, 407 F. Supp. 1053, 1064 (D. Md. 1975); *In Re Plywood Anti-Trust Litigation*, 76 F.R.D. 570, 578 (E.D. La. 1976).

The defendants' argument that numerosity has not been established on their assumption that the class is too broadly defined. That assumption in turn rests on the theory that an electrical contractor is not properly a member of the class unless the NEIF provision was "imposed" on the company against its will. Because the court has rejected the "imposition" or "coercion" theory in deciding the motions for summary judgment, the defendants' numerosity arguments must be rejected as well.

B. Commonality

The defendants do not seriously contest the plaintiffs' claim that there exists at least one question of law or fact common to all members of the class. The court finds that at a minimum, all those members would have to prove whether the defendants conspired and agreed to fix, maintain and stabilize the price of contracts with the IBEW. That finding is sufficient to satisfy the commonality requirement of Rule 23(a)(2). *In Re Independent Gasoline Antitrust Litigation*, *supra*, 79 F.R.D. at 557; *In Re Toilet Seat Antitrust Litigation*, 1976-1 Trade Cases ¶ 60,915 at 69,002-03 (E.D. Mich. 1976).

C. Typicality

The substance of this requirement, and the extent to which it is distinguishable from the provision of Rule 23(a)(4) regarding adequacy of representation, are both somewhat ill-defined. Although the two requirements certainly overlap, the typicality inquiry is broader and less exacting. Judge Thomsen of this court, sitting by designation in the Western District of Oklahoma, described the typicality requirement as follows"

The requirement of Rule 23(a)(3) is that the claim of the representative parties be "typical" of the claims of the class, and that Rule 23(a)(3) does not require that the claims of the class representatives be "co-extensive with" or "identical to" those of other class members. The requirement of typicality may be satisfied even though varying fact patterns support the claims or defenses of individual class or there is a disparity in the damages claimed by the representative parties and the other members of the class.

In Re Four Seasons Securities Laws Litigation, 59 F.R.D. 667, 681 (W.D. Okla. 1973), *rev'd on other grounds*, 502 F.2d 834 (10th Cir.), *cert. denied*, 419 U.S. 1034 (1974); *American Finance Systems, Inc. v. Harlow*, 65 F.R.D. 94 (D. Md. 1974). See also *Smith v. B&O Railroad*, 473 F. Supp. 572, 581 (D. Md. 1979). The requirement has also been defined as the third in a series of questions posed by Rule 23(a): (1) Who are the proposed class? (2) What are the claims of the class? (3) *What is the*

individual claim of the class representative? (4) Who is the representative? 3B *Moore's Federal Practice* ¶ 23.06-2 at 23-191 to 92. Under that approach, "[a]ny inquiry into the typicality under Rule 23(a) requires a comparison of the claims or defenses of the representative with the claims or defenses of the class." *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975).

The claims of the class members are that the defendants conspired to fix, maintain and stabilize the price of contracts with the IBEW, and consequently raised the cost of doing business in the electrical contracting industry, all in violation of § 1 of the Sherman Act. The class members all allege that the conspiracy arose out of the same set of circumstances. The class representatives, Foley and Commonwealth, have set forth claims identical to those of the class members. The requirement of typicality is therefore met.

D. Adequacy Of Representation

The inquiry under subpart (a)(4) of Rule 23 is usually divided into two prongs: (1) whether there are conflicts of interest between the class representatives and the class members in connection with the subject matter of the litigation; and (2) whether the class representatives' counsel are competent to conduct the litigation on behalf of all class members. 3B *Moore's Federal Practice* ¶ 23.07[1] at 23-202 to 03; *Lewis v. Capital Mortgage Investments*, 78 F.R.D. 295, 302 (D. Md. 1977); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir.), *cert. denied*, 421 U.S. 1101 (1975).

The second of those two prongs is the more easily satisfied here. All counsel have expressed the highest confidence in and respect for the inherent competence and ability of the attorneys for Foley and Commonwealth. However, the defendants have expressed some concern that the record in this case shows plaintiffs' counsel to have been dilatory and less than vigorous in their prosecution. The court agrees that in the earlier stages of the case, the plaintiffs appeared to have great difficulty in defining their claims and carrying them forward. Neverthe-

less, the record as a whole, especially in light of the oral arguments on the motions decided today, demonstrates that the plaintiffs' attorneys are vitally interested in pursuing the litigation to its conclusion, for the benefit of all the class members. The work of all counsel in briefing and arguing the motions being decided today has been exemplary in that respect.

The only real question on the issue of adequate representation is therefore whether Commonwealth and Foley are appropriate class representatives. The courts have identified two principal criteria to be considered in connection with that part of the Rule 23(a)(4) analysis. First, the proposed class representatives must show that their interests are coextensive with those of the class members to such a degree that the representatives will vigorously prosecute or defend the class's interests. Second, the proposed class representatives must show that they have no interests which are antagonistic to those of the class members. 3B *Moore's Federal Practice* ¶ 23.07[2] at 23-219; *Smith v. B&O Railroad Co.*, *supra*, 78 F.R.D. 295. In the court's view, Foley and Commonwealth have satisfied both those criteria.

In challenging the adequacy of Foley and Commonwealth as class representatives, the defendants cite six principal conflicts of interest between one or both of the two corporations and the rest of the class members. The first alleged conflict arises from the fact that since this suit began, both Foley and Commonwealth have signed a total of at least three Letters of Assent "A" authorizing certain local NECA chapters to act as the corporations' collective bargaining agents with the corresponding IBEW locals. According to the defendants, Foley and Commonwealth have bound up their business interests with the success of their agency relationship with NECA. The court is not persuaded that that is true. In the first place, the plaintiffs assert that the creation of the agency relationship through the signing of Letters of Assent "A" rather than "B" was an inadvertent aberration from Foley's and Commonwealth's usual policies. Even if the class representatives intentionally authorized NECA chapters as their collective

bargaining agents, the two corporations' interest in signing Letters of Assent would not dilute or conflict with Foley's and Commonwealth's interest in procuring the benefits that would accrue to them if the defendants were found guilty of an anti-trust violation of the NEIF were invalidated. The record simply does not support the idea that either corporation would diminish its opposition to the NEIF in order to preserve its limited agency relationships with a very few NECA chapters.²⁴

The second alleged conflict of interest stems from the fact that the defendants have lodged counterclaims against Foley and Commonwealth. The defendants argue that the posture of the case makes the class representatives more likely to settle, at the expense of the class members' interests. Although the court has been watching closely, there has not been even a glimmer of an indication that Foley or Commonwealth seeks settlement. Absent a more specific showing than the defendants have made, the court is unwilling to adopt the idea that the mere filing of a counterclaim renders the counterclaim-defendant an inadequate representative of the plaintiff class.

The third alleged conflict applies only to Commonwealth, and is supposedly inherent in the company's corporate structure. Two wholly-owned Commonwealth subsidiaries are members of NECA. The defendants argue that the subsidiary companies' business interests are therefore "bound up with the activities and fortunes of [NECA]." Opposition of IBEW Defendants to Plaintiffs' Motion for Determination of This Suit as a Class Action at 32, and that the parent company's interests

²⁴ It is interesting to note that some of the defendants contend Foley's and Commonwealth's interests are not representative of those of the class because the corporations have *no* stake in successful agency relationships with local NECA chapters. Defendants' (except IBEW and Pillard) Memorandum in Opposition to Motion for Determination of this Suit as a Class Action, at 53-54.

are in turn tied to those of NECA. The court cannot see how such an interrelationship creates a factual conflict of interest for purposes of Rule 23. As the defendants acknowledge, Commonwealth as a whole is and was sufficiently independent of NECA to be able to terminate its membership in the association when the NEIF took effect. In the court's view, that action is far more revealing of the alignment of Commonwealth's interests than is the continuing NECA membership of two of the corporation's subsidiaries.

The fourth alleged conflict is closely related to the third in that it arises out of Commonwealth's corporate structure. Commonwealth's parent corporation, C/E Construction Company, is what is known as a "double-breasted" organization: within its corporate family are both union and non-union electrical construction companies. Because the complaint alleges that the defendants' illegal practices placed class-member (union) contractors at a competitive disadvantage with respect to non-union contractors, the defendants argue that the non-union companies within C/E Construction Company stand to gain from the effects of the NEIF, and that Commonwealth's membership within the same corporate family disqualifies it as an advocate of a class of union contractors. The court does not find that logic convincing. Commonwealth's union status and its interest in invalidating the NEIF are closely aligned with those of the class members. There is no evidence that the parent corporation, C/E, would rather perpetuate the NEIF-generated advantage of its non-union subsidiaries than eliminate the NEIF-generated disadvantages of its union subsidiaries. Similarly, there is no indication Commonwealth would sacrifice its own interests in order to further those of a non-union sister corporation. The alleged conflict of interest is therefore purely speculative.

The fifth alleged conflict stems from the difference in size between Foley and Commonwealth on the one hand, and the majority of the class members on the other. The defendants argue that "large travelling contractors who enter an area for a single project, hire electricians, complete the job, and leave,

perhaps forever," NECA Defendants' Opposition Memorandum at 54, do not share and cannot represent the interest of smaller, less transient contractors who have a greater stake in preserving good will with the local unions. The defendants cite the lack of antitrust actions brought by smaller companies as evidence that those companies do not share Foley's and Commonwealth's interest in challenging the NEIF. As the plaintiffs point out, however, the lack of parallel lawsuits could just as easily be attributed to the smaller companies' inability to afford lengthy litigation, or their reluctance to antagonize the IBEW directly, in their own names. Whatever the size of the company, each has an interest in avoiding being victimized by an illegal price-fixing scheme, and Foley's and Commonwealth's size and resources make the two corporations more rather than less appropriate as class representatives.

The sixth and final alleged conflict of interest arises from the differences in the relief sought by Foley and by the class as a whole. From the memoranda and exhibits submitted, the court understands that Foley seeks both damages and injunctive relief, as do the class members. But more importantly, the court cannot see that any differences which *might* exist would create a fatal conflict of interest. The size of Foley's economic stake in the outcome, when viewed in terms of what the corporation would be obligated to pay if the NEIF were found to be legal, is great enough to ensure that the corporation will be a vigorous and diligent class representative as far as proving a violation is concerned. There is no reason to suspect that Foley's vigor would diminish when the time came to collect treble the amounts paid into the fund, whether Foley's own payments were relatively small or not. Nothing in *Air Line Stewards and Stewardesses Association v. American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied*, 416 U.S. 993 (1974), or *Maynard, Merel & Co. v. Carcioppollo*, 51 F.R.D. 273 (S.D.N.Y. 1970), indicates to the court that Foley's representation of the class would be inadequate.

Because none of the alleged conflicts of interest between the proposed class representatives and the rest of the class members is significant, the court is satisfied that Foley and Commonwealth "will fairly and adequately protect the interests of the class," and the requirements of Rule 23(a)(4) are therefore met. The next issue is whether the proposed class satisfies the requirements of either 23(b)(2) or 23(b)(3).

Although the plaintiffs argue that they have met the requirements of both those subparts, the court has serious doubts as to the class's qualifications under ¶ (b)(2). However, because the court agrees that all the requirements of ¶ (b)(3) have been met, it will not be necessary to decide the (b)(2) issues one way or the other. Accordingly, the court will conduct only those inquiries necessary under 23(b)(3): (1) whether the issues of law and fact common to the class predominate over individual issues; and (2) whether a class action is superior to other available methods of adjudication, especially in terms of manageability. *Technical Learning Collective v. DBAG*, ____ F. Supp. ____, 1980-1 Trade Cases ¶ 63,006 (D. Md. 1979); *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir. 1977).

E. Predominance Of Common Issues

The leading case governing the predominance question in the Fourth Circuit is *Windham v. American Brands, Inc.*, 565 F.2d 59 (4th Cir.). Sitting *en banc*, the court rejected the idea that there was "almost a rebuttable presumption" in favor of class certification in antitrust suits,³³ and set out a three-step process for determining whether the requirements of 23(b)(3) had been met.

³³ The "rebuttable presumption" idea had been adopted in the majority opinion of the panel which originally heard the case on appeal, 539 F.2d 1016, 1021 (4th Cir. 1976).

The court first noted that in any private antitrust action, there were three essential elements to be proved: a violation of the antitrust laws, direct injury to the plaintiff caused by the violation, and the damages the plaintiff sustained. *Id.* at 65. It was therefore not enough, the court reasoned, to determine only that issues of violation were common to the class, and to conclude that common issues therefore automatically predominated. Injury and damages might be common issues if their proof were "virtually a mechanical task," "capable of mathematical or formula calculation." But if questions of injury and damages required complex, individualized proof, then the common violation issues could not be said to predominate. *Id.* at 68; *Technical Learning Collective, supra*, — F. Supp. at —, 1980-1 Trade Cases at 77,026. "The law of this Circuit, then, demands a searching inquiry into all three elements of an antitrust suit before the district court can actually conclude that common questions predominate over individual issues." *Id.* at 77,026. The court is satisfied that in the present case, common issues as to violation, injury and damages predominate over any issues requiring individualized proof.

1. Violation

The defendants argue that the conspiracy issues do not lend themselves to common proof because the plaintiffs will have to show that each local union and each local business agent with whom the plaintiffs dealt adhered to or otherwise participated in the alleged conspiracy. That argument is merely an extension of the theory that Article Six of the National Agreement is not illegal unless the individual local unions "imposed" it on unwilling electrical contractors. As the court has already stated, it rejects that theory. In order to establish the defendant's liability, the plaintiffs have to show:

- that the defendants entered into an agreement to fix prices
- that the purpose of the agreement was to eliminate competition
- that the commodity or service whose price was fixed is within the ambit of the antitrust laws

- that the agreement does not fall within the labor exemption to the antitrust laws
- that the agreement was the proximate cause of the injuries the plaintiffs allege.

If the plaintiffs can prove those elements, they will have established the defendants' liability as to each and every plaintiff who made payments to the NEIF,²⁶ whether or not the payments were the result of "coercion" or "imposition" as the defendants define it.

In that respect, the present case is distinguishable from both *Kline v. Coldwe Banker & Company*, 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), and *Trecker v. Manning Implement, Inc.*, 73 F.R.D. 554 (N.D. Iowa 1976). In each of those cases, the alleged conspiracy was among a relatively large number of independent real estate brokers or auto parts dealers. Proof of liability on the part of only some defendants could not be presumed to establish that every plaintiff had paid an illegally-fixed price. In the present case, on the other hand, the plaintiffs need to prove a conspiracy between *only* NECA and the IBEW in order to support their damages claim. The issue of the other defendants' participation will not affect the plaintiffs' right to recover, as long as the plaintiffs prove the NECA-IBEW conspiracy. The elements of that proof, listed above, are common issues that predominate over any individual issues pertaining to the existence of a violation.

2. Injury and damages

The second and third areas for searching inquiry under the *Windham* rule are the *fact* of injury (or the impact of the conspiracy on the plaintiffs), and the amount of damages suf-

²⁶ Liability would also be established as to those who are threatened with having to make such payments, or who were indirectly injured by having the cost of the payments passed on to them. See Part III, *supra*.

ferred. Because they are so closely related in the present case, the court will treat them together. Once again, the defendants argue that individualized issues would predominate in the plaintiffs' showing of impact and damages, because each plaintiff would have to show how a particular union local or locals "imposed" the NEIF on the unwilling contractor. Proof of the necessary coercion would therefore require the "separate mini-trials" which *Windham* determined must preclude class certification. In support of their position, the defendants cite several cases, notably *Ungar v. Dunkin' Donuts*, 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976), for the proposition that common issues do not predominate where individual coercion is at issue.

The court remains convinced that individual coercion is *not* at issue in this case. Defendants' authority consists primarily of cases dealing with illegal tie-ins; those cases do not provide much guidance in a price-fixing context. While coercion is plainly an element of tying under § 1, it is not crucial to establishing that the conspiracy between NECA and the IBEW proximately caused injury to the plaintiffs, and injury in a readily-calculable amount. On the contrary, proof of impact and damages in this case "breaks down in what may be characterized as 'virtually a mechanical task,' 'capable of mathematical or formula calculation.'" *Windham, supra*, 565 F.2d at 68. The plaintiffs claim that the impact of the defendants' scheme is the higher cost of obtaining contracts for IBEW labor, and consequently the higher cost of carrying on the electrical contracting business as a whole. They also claim that the measure of the cost increase is the amount of the plaintiffs' NEIF payments, and is therefore readily determinable from the NEIF's records.

The defendants rebut that analysis as "simplistic," arguing that the amount of any overcharge—which is the correct measure of damages in a price-fixing case, *Sullivan* § 251 at 785-86; *See also Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979)—can be established only by proving what the plaintiffs would have paid for IBEW labor absent the industry fund provision. That

hypothetical price, according to the defendants, is a function of so many variables in the labor-negotiation process that it cannot be the subject of common proof.

The court does not find the defendants' argument persuasive. The one per cent charge payable to the NEIF was added on to the provisions of labor contracts already in existence in July of 1977. The parties to the National Agreement intended that it would be inserted into "all construction agreements in the electrical industry" (Article Six of the National Agreement). The amount of a particular contractor's obligation depended on both the size of its gross labor payroll and the fixed percentage determined solely by the local NECA chapter. There is no indication that the percentage or the obligation itself was meant to be negotiable, depending on the strength or location of an individual contractor.

Under those circumstances, the amount of the NEIF surcharge is for all practical purposes equivalent to the overcharge proximately resulting from the NECA-IBEW agreement. Furthermore, if the court accepted the defendants' analysis, the plaintiffs would very likely be left with no means of establishing the specific amount of their damages. Although some of the defendants suggest that the plaintiffs make individual showings of "the bargaining and economic circumstances of each local area and union," Opposition of IBEW Defendants to Plaintiffs' Motion for Determination of this Suit as a Class Action at 48, speculation about what those circumstances *would* have been absent the NEIF could hardly provide a court with a reliable basis for computing damages. As a matter of policy, an antitrust defendant should not be able to thwart any recovery against it by alleging that its own conduct "muddied the waters" to a point where the amount of overcharge became incalculable. The court has already clarified its position on that issue in Part V, *supra*, citing *e.g. Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). Where, as here, there is a written agreement containing a mathematical description of the charge to be uniformly exacted, and there are records of the amounts paid pursuant to the agreement, the measure of damages need not be established by individualized proof.

Because ascertaining injury and damages to the plaintiffs is "virtually a mechanical task," common issues predominate, and the first requirement of Rule 23(b)(3) is therefore met. The only remaining question is whether the second requirement of that subpart has also been met; that is, whether class action is superior to other available methods of adjudication.

F. Superiority Of Class Action

The court is persuaded that class action is superior to other methods of litigating this case for several reasons. First, the cost to each plaintiff of litigating its claim individually might preclude meritorious claims and dilute the deterrent effect of the Sherman Act's treble-damage provision. *Technical Learning Collective*, *supra*. Certifying the class with Foley and Commonwealth as its representatives will ensure that the suit will not perish solely for lack of financial resources. Second, a class action will probably have the least burdensome impact on the judicial system, a consideration the Fourth Circuit in *Wintham* found to be particularly important. 565 F.2d at 70, 72. Common proof of the liability issues, and mechanical determination of damages, will permit the most efficient resolution of the controversy. Third, the court cannot foresee any serious manageability problems if the suit goes forward as a class action: the class representatives have agreed to assume the cost of notifying class members, and the NEIF records are likely to make notification a relatively straightforward (although laborious) task. Fourth, the class members do not appear to have a strong interest in pursuing individual lawsuits. As the plaintiffs noted at oral argument, the defendants themselves have argued in another context that many class members may be hesitant to sue individually, for fear of jeopardizing their continuing relationships with the IBEW. In the court's view, that possibility implies that the controversy will be litigated most thoroughly and effectively if it proceeds as a class action. *See Technical Learning Collective*, *supra*.

In sum, class action is superior to other methods of litigation in the present case. The plaintiffs have met the criteria of Rule

23(b)(3) as well as those of Rule 23(a), and the motion for class certification must accordingly be granted. Pursuant to Rule 23(c)(2), the court will direct that the class representatives provide individual notice to all members who can be identified through reasonable effort, and that they provide the best notice practicable to all other members.

VII. Plaintiffs' And Defendants'²⁷ Cross-Motions For Summary Judgment On The Defendants' Counterclaims

The essence of the NECA defendants' motion is the allegation that the plaintiffs, in refusing to pay the amounts they owed the NEIF, and in filing suit to invalidate the industry fund, engaged in an illegal boycott of the NEIF with the purpose of damaging NECA. The NECA defendants characterize the boycott, and the plaintiffs alleged conspiracy that resulted in the boycott, as a violation of § 1 of the Sherman Act. In their cross-motion, the plaintiffs seek summary judgment declaring that as a matter of law, the NECA defendants are not entitled to recover on any of their counterclaims.

In light of the court's conclusion that the plaintiffs are entitled to summary judgment on the issue of the National Agreement's illegality, it would be anomalous to conclude that the plaintiffs' refusal to pay into the NEIF was and is an illegal boycott. Even if the court were to address the merits of the counterclaims without regard to the NEIF's illegality, the court would have considerable difficulty characterizing the plaintiffs' alleged concerted action as the type of activity forbidden by the Sherman Act. But because the NEIF is illegal *per se*, the plaintiffs' refusal to contribute to it cannot subject

²⁷ As the court explained in Part I., only NECA and the NEIF trustees have filed counterclaims. The motions discussed in Part VII apply only to those defendants.

them to antitrust liability. Their motion for summary judgment on the counterclaims must be granted, and the defendants' must be denied.

VIII. Summary

The disposition of the pending motions can be summarized as follows:

(1) the defendants' motion to dismiss NCA as a plaintiff must be denied;

(2) the defendants' motion to dismiss the claims of the "indirect-hire" plaintiffs must be denied as to the § 16 claims, but granted as to the § 4 claims;

(3) the motion of defendants Colgan and Miller to dismiss the complaint as to them must be denied;

(4) the plaintiffs' motion for summary judgment on the primary claims must be granted, and the defendants' cross-motion for summary judgment on the same claims must be denied;

(5) the plaintiffs' motion for class certification must be granted; and

(6) the plaintiffs' motion for summary judgment on the defendants' counterclaims must be granted, and the defendants' cross-motion for summary judgment on the same claims must be denied.

The court will enter a separate order to that effect.

/s/ Herbert F. Murray
HERBERT F. MURRAY

Dated: September 9, 1980

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM77-1302

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *et al.*

INJUNCTION

By reason of the rulings contained in the Court's Memorandum Opinion dated September 9, 1980, it is this 10th day of October, 1980, by the United States District Court for the District of Maryland, hereby

ORDERED that the defendants, NECA, Colgan Electric Company, Inc., Miller Electric Company, Robert L. Higgins, IBEW, Charles Pillard, Trustees of the NEIF, H. E. Autrey, Allen Bader, Frank H. Bertke, Donald E. Cates, Robert W. Colgan, Joe R. Devish, J. D. Hilburn, Sr., Carl T. Hinote, Warren E. Losh, John Ostrow, C. W. Stroupe, Allan H. Stroupe, L. R. McCord, Aldo P. Lera, and Lowell C. Timm, their respective officers, directors, agents, employees, successors, assigns, as well as any and all other persons or entities acting under, through or at the direction of the defendants are enjoined from seeking to continue, continuing, enforcing, maintaining or renewing Article Six of the National Agreement between the International Brotherhood of Electrical Workers and the National Electrical Contractors Association dated December 8, 1976, and any amendments thereto, as to any person, corporation or other entity which is not a member of the National Electrical Contractors Association, or from

entering into, maintaining or participating in any act, contract, agreement, understanding, plan, program or other arrangement with any person, corporation or other entity which is not a member of the National Electrical Contractors Association that includes any provision implementing Article Six of the aforesaid agreement. And it is further

ORDERED that the above-mentioned defendants, their respective officers, directors, agents, employees, successors and assigns, as well as any and all other persons or entities acting under, through or at the direction of defendants are enjoined from demanding, soliciting, collecting or receiving from any person, corporation or entity which is not a member of the National Electrical Contractors Association contributions to the National Electrical Industry Fund, or any alternate or substitute therefor the effect of which would be to add a surcharge, determined by a uniform formula, to the cost of procuring all contracts with the IBEW in the electrical construction industry. It is not the purpose of this Order to preclude defendants from prosecuting or defending lawsuits or administrative proceedings pending at the time of entry of this Order; nor is it the purpose of this Order to make any determination with regard to any person, corporation or entity which has entered into a settlement with the defendants.

The Court directs the defendants, International Brotherhood of Electrical Workers, National Electrical Contractors Association and the Trustees of the National Electrical Industry Fund to furnish promptly to each of their local chapters, local unions, and all collection agents of the National Electrical Industry Fund a copy of this Order.

/s/

United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 80-1808/1809

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., *et al*

Appellants

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al*

Appellees

Submitted: June 1, 1982

Decided: September 8, 1982

ORDER

I

The National Electrical Contractors Association, et al filed their petition for rehearing with a request for rehearing en banc.

Upon a request for a poll of the court on the petition for rehearing en banc, less than a majority of the judges in regular active service voted in the affirmative.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc of National Electrical Contractors Association, et al shall be, and the same hereby is, denied.

II

Miller Electric Company and Colgan Electric Company filed their petition for rehearing with a request for rehearing en banc. On the petition there was no request for a poll of the court on the petition for rehearing en banc.

It is accordingly ADJUDGED and ORDERED that the petition for rehearing en banc of Miller Electric Company and Colgan Electric Company shall be, and it hereby is, denied.

J

III

The panel has considered both the said petitions for rehearing and is of opinion they are without merit.

It is accordingly ADJUDGED and ORDERED that both the said petitions shall be, and they hereby are, denied.

Judge Michael concurs in this entire order.

Judge Hall concurs in part II of this order and in the denial of the petition of Miller Electric Company and Colgan Electric Company.

As to part I of this order, Judge Hall would have granted the petition for rehearing en banc; as a member of the panel, he would have granted the petition for rehearing of National Electrical Contractors Association, et al; both for the reasons set forth in his dissenting opinion.

/s/ _____
For the Court

SUPREME COURT OF THE UNITED STATES

No. A-477

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, *et al.*,

Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*

**ORDER EXTENDING TIME TO FILE
PETITION FOR
WRIT OF CERTIORARI**

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 7, 1983.

/s/ Warren E. Burger
WARREN E. BURGER
Chief Justice of the United States.

Dated this 29th
day of November, 1982

Section 1 of the Sherman Act, 15 U.S.C. §1 provides in pertinent part:

"§1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Sections 4 and 6 of the Clayton Act, 15 U.S.C. §§ 15, 17 provide in pertinent part:

"§15. Suits by persons injured; amount of recovery; prejudgment interest

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the

defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the anti-trust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only --

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule,

statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof."

"§17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20 of the Clayton Act, 29 U.S.C. Section 52 provides in pertinent part:

§52. Statutory restriction of injunctive relief

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation or employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may

lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

Sections 1, 2, 5, 6 and 13 of the Norris-LaGuardia Act, 29 U.S.C. Sections 101, 102, 105, 106 and 113 provide in pertinent part:

"101. Issuance of restraining orders and injunctions; limitation; public policy

No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with

the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

§102. Public policy in labor matters declared

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or

coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

§105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

§106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor

dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

§113. Definitions of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter --

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests

in a 'labor dispute' (as defined in this section) of 'persons participating or interested' therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Sections 8(a)(5), 8(b)(3) and 8(d) of the Labor Management Relations Act as amended, 29 U.S.C. Sections 158(a)(5), 158(b)(3), 158(d) provide in pertinent part:

"§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer --

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

(b) It shall be an unfair labor practice for a labor organization or its agents --

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 159(a) of this title;

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the

execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession".

Engineering News-Record

ENR

**Trade groups find a way
to expand their services**

International Design Firms

(EXHIBIT F TO NECA DEFENDANTS
RESPONSE TO PROPOSED ORDER)

NECA

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INDUSTRY FUNDS

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ENR To Fill You In

Early in the research for this week's cover story on industry funds, Assistant Editor Jay Kraker confirmed one fact he had already been warned about: Some of the potential information sources who could help him would rather not. The mere fact that ENR was planning the story caused some uneasiness. Kraker was told a number of times that nothing positive could come of such a report. He says he spent nearly as much time trying to convince some sources he had no ax to grind as he did gathering information.

But reluctant or not, they helped, in 140 interviews. Not until the 100th or so, says Kraker, did some of the missing pieces start to fall into place.

You won't know all there is to know about industry funds after reading the story (see p. 18). Kraker reports that no one even knows how many exist. But the reason for some of the sensitivity becomes

clear: One official of a contractor association told Kraker the association probably will fold soon without industry-fund income to supplement income from membership dues. Maybe that's unique and maybe not. In any case, some of those ENR interviewed would like to see the activities that now depend on industry funds financed by dues instead.

Before moving into ENR's management and labor group last year, Kraker spent a year and a half in our transportation group. In contrast to reporting on a construction project, he says, covering union management and labor subjects is like trying to nail jello to a wall. You fasten it down and it still wiggles. Industry funds are a perfect example of that, Kraker adds. Although research for the report began in earnest early this year, ENR has long planned such a story. In fact, the first assignment for the article was dis-



Kraker

patched to correspondents in the field in 1982.

Kraker has a journalism degree from the University of Ohio, Athens. He came to ENR from a Norwalk, Conn., daily newspaper, the HOUK.

DAVE McGRATH, Publisher.

106th Year of Publication



Engineering News-Record

The McGraw-Hill Construction Weekly

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Funds help trade associations grow in

Questions remain over their impact on the industry

Contractor groups nationwide are tapping a source of funds to improve and expand their services in ways they previously could not begin to afford. That source—the subject of heated debate and a pending major lawsuit—is the industry fund.

Industry funds, known variously as industry advancement or premium funds and by other names, are generally included as employer contributions in collective bargaining agreements. Usually, they're in terms of cents-per-hour and occasionally a percentage of gross payroll. The funds may be administered by a management-controlled trust, contractor association or other corporation but, by law, labor cannot have a direct say in their use (see p. 21).

The funds, generally tax-exempt, range in input from a few thousand dollars to more than \$5 million in contributions annually. And their organization and purposes vary widely.

The vast majority are set up by local associations, as a type of management counterpart to the unions' dues checkoff. They may, for example, provide financial assistance in labor contract administration and dispute resolution, and assist contractors in complying with government regulations. They also may provide for educational and safety programs and market development work that few associations can afford through traditional dues collections. The list of uses is lengthy. The only rule among all industry funds seems to be that their activities must benefit all contributors rather than association members only.

Subject of debate. Debate over the industry fund method of financing associations and other activities is as old as industry funds themselves, many of which date to the 1950s. But a major lawsuit over a fund organized nationally by the National Electrical Contractors Association (NECA) and the electrical workers' union (IUEW) has rekindled some issues (see box).

Some say that although industry funds are a nonmandatory source of bargaining—that is, no employer or union can be forced to bargain over them—in practice, contractors either must contribute to the funds to get union labor or must accept onerous contract terms during bargaining where the unions choose to support industry fund provisions. This is a major argument in the NECA case.

Construction user groups—the most vocal of which has been The Business Roundtable—and others in various industry sectors, believe the price paid for the industry funds and their programs may be too high. "Where a contractor association becomes dependent on an industry fund, the choice of the union to include [a fund] in the contract or to exclude it becomes a powerful lever in negotiations," the Roundtable argued in a 1978 report. The report also suggested that such an "easy mechanism of collecting money . . . invites looseness in both the type of program supported as well as in the actual expenditures."

The Roundtable maintains that associations can accomplish as much without industry funds as with them, without any threats from unions to cut off the funds.

Some reasons why industry funds



Where controversy surrounds industry funds, the discord is rooted deep in some of the same confrontations that help perpetuate the fragmentation of management.

Associations vs. national contractors. The need for increased sophistication on the parts of both unions and management in construction has sharpened in the past 20-plus years. In large part, this is because of increasingly complex laws relating to labor, equal employment opportunity, job safety and environmental control.

The burden of getting such regulations into the field, explaining their requirements and sometimes going before government enforcers to defend against alleged violations are among the jobs that have fallen to local contractor associations—in addition to their traditional collective bargaining functions. In most cases, only the largest of contractors are capable, on their own, of maintaining the expertise to perform these additional tasks.

Some of these large firms are reluctant to contribute to industry funds that support such activity. Most industry fund programs "are not worth it to our size firms," says Maurice L. Mosier, president of the National Constructors Association (NCA), noting that some national agreements specify that

new ways

are an issue

such contributions are not required although local wage rates and some contract terms are.

Associations vs. independents. The off-strained relationship between the local association and independent firms is similar in some respects in the association-national contractor situation. Nonmember companies often use the association's labor agreements and benefit from its work in other areas without supporting the group financially or serving on committees or as fringe benefit fund trustees. More importantly, perhaps, the independent local contractor incurs no obligation to shut down its jobs in support of the association during collective bargaining strikes. Neither does the national contractor, but often it may do so.

Industry funds often are arranged with the intent of getting these so-called "freeloaders" to pay for their share of association-derived benefits. It is just such a case that has kept NECA, the National Electrical Contractors Association (NECA) and the electrical workers' union (IBEW) in court for three years (ENR 8/11/77 p. 14).

By written agreement in 1976, NECA and IBEW agreed, among other things, to form the National Electrical Industry Fund—funded by employer contributions from 0.2% to 1% of gross IBEW electrical payroll. They also agreed to include the industry fund language in "all construction agreements in the electrical industry."

NCA contests NECA's argument that when NCA members pick up NECA-negotiated local contract terms (directly and under certain project and national agreements) they are obligated to contribute to NECA's industry fund. Briefly, NCA and the other plaintiffs in the antitrust case charged NECA and IBEW with conspiring to monopolize collective bargaining representation in electrical construction, requiring them to purchase NECA services to obtain IBEW labor, and imposing upon them a surcharge on the use of IBEW labor.

NECA and IBEW denied the charges, countering that NCA maliciously induced its members and others to breach contracts including obligations to contribute to the industry fund. They also say the national agreement to include the fund in labor contracts applies only to those contracts between NECA chapters and IBEW locals.

Further, NECA charged NCA with impairing "the competitive position of local electrical contractors by destroying local and national industry associations" and funds, inducing NECA members to resign, and stockpiling unneeded labor.

Both sides have motions for summary judgment pending and NCA is seeking to make the suit a class action. A pretrial conference is scheduled Sept. 12 in federal district court in Maryland and the trial is slated to begin in October.

Early history. Multipurpose, management-oriented industry funds and others geared exclusively to provision of certain products and types of construction both got their start in the 1950s. And it is Harry Taylor, former executive director of the Philadelphia Builders Chapter of the Associated General Contractors (AGC), who is most commonly called "the founding father" of industry funds.

"We had requests from a lot of members to do things that there was no way dues could perform," Taylor recalls. "One was an educational program for middle management and another one was the safety program."

"In 1957 . . . we were quite certain we weren't going to get away in negotiations in another three years without getting into fringe benefits for the unions. And we couldn't see why all fringe benefits had to go to one side when we were sorely in need of funds," Taylor continues.

The industry fund Taylor started in 1960 continues to support several activities characteristic of management-oriented funds: developing curricula and providing scholarships for two and four-year college construction management programs, conducting public relations programs aimed at the general public and sponsoring programs on construction careers.

Other industry funds (some of which Taylor helped get started by explaining how Philadelphia's began) "are improving on what we did," Taylor says. Among those improvements are programs for crime prevention, promoting labor peace through groups like Indianapolis' Top Nesh, conducting research on construction materials and methods and writing construction standards for specialty work. The list goes on.

Need for funds. Several long-time contractors and association officials call the birth of industry funds a turning point in the basic nature of contractor associations. They say it changed many that did little more than conduct labor negotiations once every three years, and organize an annual picnic, to those that now offer a broader range of services.

The need for those services and the money to support them has multiplied with increasing government regulation, wage gov. "I used to be able to handle it all myself," says Ronald E. VanGelder, who recently resigned as executive vice president of the Sheet Metal and Air Conditioning Contractors' National Association (SMACNA). "Now we have to manage 100-some organizations and we need experts to do it," he explains, citing equal opportunity, job safety and other laws.

When industry funds began, "no one ever heard of filing an unfair labor practice charge," adds John J. Richards, executive director of the Builders Exchange of Rochester (N.Y.).

The need for industry funds is real and they provide "legitimate" services, says another association executive. "But there were no altruistic motives" in their formation.

He and other association staffers in the Northeast say some of the funds, in that area at least, came into being as a strong post-World War II economy helped independent contractors flourish and compete with association members. The members watched their new competitors take what had been their work—without paying dues to the association or giving of their time in such capacities as fringe benefit fund trustees.

As a result, many members left the associations. The problem then was to support those groups with dwindling numbers of dues-paying members. In many cases, the answer was the industry fund, where those firms that signed the associations' labor agreements contributed to the groups' financial support.

"It's a matter of survival" for many, says one association

Buddy Beeson, former Local 342 business agent and currently Kean's top staffer, declined comment by phone and on several occasions was unavailable for an interview.

To help reduce area settlements and management's fragmentation in bargaining with the plumbers, members of the Underground, Mechanical & Industrial Contractors and the Plumbing, Heating, Piping Employers Council have assigned their bargaining rights to NRC with a principal objective being to reach settlements that do not include industry funds.

NRC has not signed any agreements that call for industry fund contributions but its effect on lowering settlements is still uncertain. In negotiations earlier this month, a first and a second association split from a joint bargaining group, which included NRC, and signed a pact with Local 342, raising the current

As with all questions about industry funds, there is no single answer. Some contractors say it's their duty to provide financial support to the associations even if they cannot give of their time. Harold F. Elam, secretary-treasurer of Elam Construction, Inc., Grand Junction, Colo., says the fund in his area "has helped us get work" through advertisements that encouraged one county to contract for paving work it previously did in-house.

Anthony A. Benitend, president of Garco Construction Co., Pittsburgh, says nonmember firms sign the association agreement and pay the industry fund "because they know the street contract isn't going to be as good." And one association executive says many nonmembers sign because they "aren't sophisticated enough to strike" the fund from the labor agreement and don't know it's not a mandatory subject.

Industry funds get mixed reviews from labor

Organized labor's response to industry funds has varied from one trade to another over the years and still is far from unified.

Such trades as the bricklayers and plasterers, for example, which have been hurt by technological change, have as much to gain from promotion-oriented funds as contractors do. And many management-oriented funds allow tradesmen to participate in seminars and other programs they sponsor. But in the case of promotion funds, the unions involved believe more could be accomplished if they legally could have a hand in the funds' administration, along with management.

Several early promotion funds were jointly administered, but a 1962 federal appeals court decision in the Paramount Plastering case ended joint administration when it said employer contributions to such funds violated Sec. 302 of the federal labor law (ENR 12/13/62 p. 73). That section limits the types of funds that may be jointly administered, such as health and welfare, pension, vacation and apprenticeship. It does not include industry funds.

Despite the court decision, "we have seen no public policy reason why labor should not be involved" in management of promotion-oriented funds, says John T. Joyce, president of the bricklayers' union. "It's useful for labor and management to come together and confront their common reality. And that reality is the external market."

Joyce explains that it was largely at his union's initiative that the International Masonry Institute—the market promotion arm of the union and the Mason Contractors Association of America—was formed in 1970. The bulk of the institute's \$775,000 budget in 1979 went to public relations

and advertising to help increase the work both for mason contractors and the trowel trades.

"Why should we go to that kind of effort?" if the only real choice labor has as an adviser to a fund is whether to keep it in the collective bargaining agreement? Joyce asks rhetorically. If employer groups want to set up the fund, "there's no reason for them not to," Joyce continues. "But if they want them in the [labor] agreement, . . . why shouldn't labor have a hand in it?" he reiterates.

Joyce's answer to that situation would be to change Sec. 302 to allow joint administration of promotion-type funds, but at this point that is just a part of the union's broad laundry list of legislative objectives.

Several attempts to change Sec. 302, with a similar intent, all failed in the 1960s after contractor groups protested that the change would have unions think they could get joint control of all industry funds, not just those in promotion.

"There are strong feelings both pro and con within the trades" regarding industry funds, Robert A. George, president of the Building and Construction Trades Department, AFL-CIO, told ENR. He says "some crafts have been 'devastated' by certain industry funds that 'subvert collective bargaining' and 'work against the best interests of the building trades.'" This is despite clauses in many collective bargaining and industry fund trust agreements that prohibit antitrust activities by the funds.

As for joint administration of promotion funds, George agrees it would help. But the issue isn't being pushed. "We're always a little afraid to fool with Taft-Hartley," says George. "We could lose more than we'd gain."

Despite the questions and the potential pitfalls, most industry funds ENR contacted have operated for several years with few complications. Earn New Jersey's Burke, who eliminated his association's industry fund "for very specific reasons," believes they can do great things. That group has begun another fund "on an experimental basis" with one trade, Burke says. But, he warns, "We've dropped it before and we can drop it again."

Alternatives? Many industry observers see no other way to support the types of services that have been able to grow because of industry funds. In search of alternatives, some say association members would be liable for industry fund contributions even if they could not be included in collective bargaining agreements. To this, many associations add that members contribute the lion's share to the funds.

But others suggest that multiemployer certification—in which one association would become the exclusive bargaining agent for those firms doing the same type of work in a given area—is the answer. "The only other alternative," says another association executive, "is to go back to the same people who have always paid the bills and ask for more, more, more. I can't do that."

wage-fringe package by \$2.31 to \$25 this year, plus \$2 or unpaired cost-of-living increases (whichever is higher) in the second and third years (ENR 7/24 p. 69).

Plumbers' General President Martin J. Ward has told industrial contractors working in the area under national agreements to continue working, under the rules set in Local 342's agreement. But at press time, many of those firms were still shut down in support of NRC's position. Ward and other top union officials repeatedly were unavailable for comment.

Other questions. There are other questions about industry funds, too. One is why contractors decide to support associations' activities through the funds when they choose not to join and support the groups through dues.

The courts and the National Labor Relations Board have established that industry funds are a nonmandatory subject of bargaining and that negotiating to an impasse over them is an unfair labor practice. Even when a local union prevents a contractor with a master agreement that includes an industry fund, the employer has the right to strike that provision because of its nonmandatory status, prominent labor lawyers say.

ENR Editorials

Are industry funds the answer?

Contractor association financing in general and industry funds in particular may not be a top-priority issue yet in the eyes of construction management. But as the industry becomes ever more complex and the need for sophisticated management grows, the issues surrounding industry funds will have to be faced.

This week's cover story (see p. 18) is an effort to define some of those issues and give them some perspective.

No one knows how many industry funds exist, how many contractor associations have them or how dependent those associations are on the funds. But the evidence is overwhelming that without industry funds, valuable education, market promotion, government relations and other services would be lost to many. More than a few local association officials go even further, claiming that without such funds their associations would go out of business.

The many services industry funds support could lead some to believe that the funds are the best thing to happen to construction since the invention of the nail. But two warnings must be added: It still is the responsibility of contractors who contribute to the funds to satisfy themselves that the funds are working in their interests. And all associations relying on the funds to any degree must face the fact that labor may not always allow use of the collective bargaining agreement to make the collections.

The Business Roundtable takes the position that contractor associations should be able to provide the same range and quality of services through traditional dues collections alone—without industry funds. Only by removing financing from labor agreements can trade groups be sure the unions won't cut them off at the pockets, it says.

"Responsible contractors have consistently believed that all contractors have the obligation to support their association by participating in its activities and by their financial support," the Roundtable argues. That's a noble position. But many contractors would not live up to such a standard of responsibility. Not only are there many who won't join, for example, but some who do will defect when a strike is on and keep tradesmen working under retroactive or interim agreements. This gives the unions a better chance to get associations to give in to workers' demands.

However, the funds' main effect on collective bargaining is not what they may add to union leverage but rather their possible encouragement of continued fragmentation of the management side into numerous units that bargain independently in the same area with the same unions.

One answer, within this area, would be multiemployer certification legislation, which would be aimed at unifying management in bargaining. Such legislation would remove some of the reasons for not joining associations while simultaneously pulling the plug on some of those artificial financial respirators that keep small or weak associations alive and perpetuate fragmentation.

If it is unity that construction management is seeking—

and we must assume it is—then that search must also involve a long and thorough look at the role industry funds can—and do—play in the very fabric of management organization.

Uncertainty paralyzes action

There's a Chinese adage to the effect that when elephants fight, it's the grass that suffers.

Congressional Democrats and Republicans and the administration are in a three-way bicker over tax cuts (see p. 10) that is trampling down construction turf. It is undercutting the future by introducing a high degree of uncertainty. Business hates uncertainty.

To take just one element of the struggle in which the construction industry has a vital interest: part of the tax cut plan would speed up depreciation of buildings. No one in the political game seriously opposes it. The quarrel mostly resolves itself to a matter of timing—now, soon or later.

It isn't hard to imagine what this uncertainty means to a corporate board of directors about to approve a capital construction budget. The process is near paralysis.

Participants in the tax-cut fight ought to stop long enough to assure business that the depreciation speedup is coming for certain, and that construction or modernization begun on, say, June 1, will be "grandfathered" in whenever the tax-law changes get on the books.

This nation, with its huge stock of obsolescent factory buildings, needs to start rebuilding now, not later.

Alaska land and resources

The continuing debate over land use in Alaska (see p. 15) may go on to a filibuster again this year. Both of the state's senators want resource development encouraged; they are industrial development stalled. But a majority in both houses of Congress appears to favor fencing off from development more than the 93 million acres already closed by administrative order.

The management of land and of resources alive and below its surface is a complex matter not limited to conservation of wilderness or cutting of timber. In Alaska, it involves the evaluation of riches that have not yet been fully explored, let alone evaluated.

It would be wrong for the lower 48 (and Hawaii) to legislate Alaska out of future use of vast resources within its borders. It would be wrong in the face of incomplete resource inventories—and in the face of U.S. dependence on foreign resources.

It's interesting to consider that if the pro-wilderness forces at work now had prevailed then, we would not now have the Alaska pipeline. Congress acted wisely then. The same kind of wisdom is needed now.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 78-0562-B

CURTIS L. WILLIAMS, Collection Agent for
National Electrical Industry Fund,
Plaintiff,
v.
ITT GRINNELL INDUSTRIAL PIPING, INC.,
Defendant.

Filed May 21, 1980
Clerk, U.S. Dist. Court,
Richmond, VA.

MEMORANDUM

Plaintiff commenced this action in the Henrico County General District Court to recover \$525.66 allegedly owed by defendant under a collective bargaining agreement. The action was subsequently removed to this court as the subject matter was governed by 29 U.S.C. § 185. Plaintiff's motion to remand was denied.

The parties have entered into a written stipulation of all facts material to the resolution of this controversy. Cross-motions for summary judgment and supporting memoranda have been filed. Jurisdiction over the subject matter of this action vests in the court under 29 U.S.C. § 185(a). The matter is ripe for disposition and for the reasons which follow the Court is of the opinion that summary judgment should be granted in favor of the plaintiff.

Plaintiff Curtis L. Williams is the local collection agent for the National Electrical Industry Fund ("NEIF"). Defendant, ITT Grinnell Industrial Piping, Inc. ("ITT") is a Delaware

corporation authorized to do business in Virginia as an electrical contractor.

Other entities which were involved in this dispute are: The National Electrical Contractors Association, Inc. ("NECA"), a corporation engaged in representing electrical contractors in national negotiations with The International Brotherhood of Electrical Workers; and The Virginia Chapter of the National Electrical Contractors Association ("Virginia Chapter"), which represents electrical contractors within Virginia in negotiating collective bargaining agreements with local units of The International Brotherhood of Electrical Workers, including Local 1340.

In December, 1976 ITT was engaged in a project in the Tidewater area of Virginia. At that time it entered into a Letter of Assent with the Hampton Roads Division of The Virginia Chapter ("Hampton Roads"). The Letter of Assent provided that Hampton Roads was to be ITT's

collective bargaining representative for all matters contained in or pertaining to the current approved inside agreement between the Hampton Roads Division, Virginia Chapter, NECA and Union 1340, IBEW.

This Litigation arises from the parties' disagreement as to the scope of Hampton Roads' authority under the Letter of Assent.

The inside agreement referred to in the foregoing quotations was the collective bargaining agreement executed by Hampton Roads and Local 1340, IBEW on March 31, 1976. Section 1.03 of that agreement provided:

This agreement shall be subject to change or supplement at any time by mutual consent of the parties hereto. Any such change or supplement agreed upon shall be reduced to writing, signed by the parties hereto, and submitted to The International Office of IBEW and The National Office of NECA for approval, the same as this Agreement.

Pursuant to § 1.03, Hampton Roads and Local 1340, IBEW agreed to various amendments in February 1977. The amendments included addition of a "Management's Rights" section, a

change in the permissible apprentice-journeyman ratio and the addition of § 5.12. The amendments ultimately became effective April 1, 1977.

Section 5.12 established the NEIF and provided:

Each individual employer shall contribute one percent (1%) of the gross labor payroll to be forwarded monthly to The National Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer.

In early September, 1977, ITT paid plaintiff \$108.08 in satisfaction of its § 5.12 obligations for the month of July, 1977. Approximately two months later ITT informed plaintiff that the payment was in error and should be credited to the employer's obligations to The National Electrical Benefit Fund. Defendant made no NEIF payments thereafter. The amount claimed to be owing under § 5.12, \$525.66, is the subject of this suit.

Two issues are presented for the Court's consideration. First, did the Letter of Assent authorize Hampton Roads to amend the applicable collective bargaining agreement and bind ITT? If so, did Hampton Roads violate its common law fiduciary duty as an agent in agreeing to the insertion of § 5.12?

The Court has little difficulty with the first question. The Letter of Assent authorized Hampton Roads to represent ITT with respect to "all matters contained in or pertaining to . . . the inside agreement." Section 1.03, concerning amendments, was obviously a matter contained in or pertaining to the collective bargaining agreement. ITT could not have interpreted the Letter of Assent and § 1.03 otherwise, for the latter provided for "change or supplement at any time."

Calhoun v. J. W. Bernard, 333 F.2d 739 (9th Cir. 1964), relied upon by defendant, is not persuasive. In *Calhoun* the issue was whether the employer contracted for other than that

which was contained in the memorialization of the negotiations. No such question has been raised here.

Equally unavailing is ITT's argument that the Letter of Assent bound defendant only to amendments of provisions then included in the agreement. Section 1.03 was not so limited and, in fact, provides for the addition of new terms.

The fact that the "NEIF" has been characterized as an industry promotion fund, and thus not a mandatory subject of collective bargaining, does not alter the Court's conclusion. The "NEIF" remained a subject which could be negotiated, as was the provision preserving unto Local 1340, IBEW the right to discipline its members.

ITT further asserts that Hampton Roads violated its fiduciary duty as an agent in agreeing to § 5.12. In support of that position ITT emphasizes that NEIF and NECA share an identity of interest in that the trustees of the former are members of the latter's executive committee. Additionally, 80% of the employer's NEIF contributions are retained by the local NECA chapters with the balance paid to NECA.

At first blush it appears that Hampton Roads violated its fiduciary obligations by profiting at the expense of its principal. A contrary conclusion is apparent, however, upon consideration of the "Basic Principles" contained in the agreement and The NEIF Declaration of Trust.

The "Basic Principles" governing the agreement which ITT originally joined state that

The Employer and The Union have a common and sympathetic interest in the electrical industry. Therefore, a working system and harmonious relations are necessary to improve the relationship between The Employer, The Union and The Public.

These goals undoubtedly were intended to guide Hampton Roads in discharging its duties as well as setting forth the basis for relations between the employer and the union.

The Declaration of Trust limits the NEIF's use of employer contributions to specific activities. NEIF funds may be used to advise the public of services performed by the electrical contracting industry. The NEIF may also seek improved and uniform government codes. Funds may be expended to train employees or acquaint them with new products. Management and sales personnel may also be trained at NEIF expense. The NEIF may also pay the employer's cost of collective bargaining. In short, each permissible NEIF activity is consistent with the "Basic Principles" set forth above and to the benefit of ITT.

ITT still stood to benefit from NEIF activities even though it was not an NECA member. That ITT engaged in very limited Virginia business also does not alter the Court's view; although that question might be relevant to whether ITT should have entered into the Letter of Assent in the first instance.

Finally, ITT surely could not have expected Hampton Roads to bind it only to favorable provisions. ITT knew it was not a NECA member and it knew that Hampton Roads and Local 1340, IBEW had executed a multi-employer collective bargaining agreement. Hampton Roads' authority and duty should be examined in the context of the realities of this situation.

Plaintiff alternatively urged a ratification theory in support of its motion. Because of the views set forth herein, the Court was not required to rule upon that argument. It is interesting to note, however, that there is no suggestion that ITT objected to any of the other amendments to the collective bargaining agreement.

Judgment will thus be entered for the plaintiff. An appropriate order shall issue.

/s/

United States District Judge

Date: May 21 1980

EXHIBIT E

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

Civil Action No. 78-0562-R

CURTIS L. WILLIAMS, Collection Agent for
National Electrical Industry Fund, *Plaintiff,*

v.

ITT GRINNELL INDUSTRIAL PIPING, INC.,
Defendant.

Filed May 21, 1980
Clerk, U.S. Dist. Court,
Richmond, VA.

ORDER

In accordance with the memorandum of the Court this day filed, and deeming it proper so to do, it is ADJUDGED and ORDERED that plaintiff's motion for summary judgment is GRANTED and judgment is entered in favor of the plaintiff.

Let the Clerk send a copy of this order and the accompanying memorandum to counsel of record.

/s/ _____
United States District Judge

Date: May 21 1980

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
WASHINGTON, D.C. 20570

December 21, 1978

Re: Int'l Bro. of Electrical Workers, AFL-CIO, et al. (The
Howard P. Foley Company et al.)

Cases Nos. 5-CB-2422

5-CC-871

5-CC-428

Int'l Bro. of Electrical Workers and its Local Union No. 5,
AFL-CIO (The Howard P. Foley Company)

Case No. 6-CC-1206

Int'l Bro. of Electrical Workers, AFL-CIO, Local No. 8

Case Nos. 8-CB-3653

8-CC-895

IBEW Local Union No. 323 (The Howard P. Foley Com-
pany)

Cases Nos. 12-CB-1921

12-CC-1011

Electrical Workers Int'l and Local No. 903 (The Howard
P. Foley Company)

Case No. 15-CC-690

IBEW and Local 59

Cases Nos. 16-CB-1344

16-CC-596

Int'l Bro. of Electrical Workers, AFL-CIO, IBEW Local
Union No. 288 (The Howard P. Foley Company)

Cases Nos. 18-CB-855

18-CC-692

Int'l Bro. of Electrical Workers, AFL-CIO, IBEW Local
Union No. 716 (National Constructors Assn.)

Cases Nos. 23-CB-2074

23-CC-720

Int'l Bro. of Electrical Workers, AFL-CIO, IBEW Local
Union No. 527 (National Constructors Assn.)

Cases Nos. 23-CB-2075

23-CC-721

Int'l Bro. of Electrical Workers, AFL-CIO

Case No. 25-CC-421-1

Int'l Bro. of Electrical Workers, Local Union No. 16
(Commonwealth Electric Company)

Case No. 25-CC-421-2

Int'l Bro. of Electrical Workers, Local Union No. 570,
AFL-CIO, (National Constructors Assn.)

Case No. 28-CB-1268

Int'l Bro. of Electrical Workers, AFL-CIO, and IBEW
Local Union No. 750 (National Constructors Assn.)

Case No. 28-CC-624

Int'l Bro. of Electrical Workers *et al.* (A.C. Electric
Corp., *et al.*)

Case No. 31-CC-891

IBEW, Local 1245

(The Guy F. Atkinson Co.)

Cases Nos. 32-CB-76

32-CC-48

Anthony J. Obadal, Esquire
Zimmerman and Obadal
1101 15th Street, NW
Washington, D.C. 20005

Dear Mr. Obadal:

Your appeal from the Regional Director's, Acting Regional Director's and the Acting Officer-in-Charge's refusals and/or partial refusals to issue complaints in the above-captioned cases has been carefully considered.

The appeal is denied. The evidence was deemed insufficient to establish that the International was engaged in a nation-wide plan to unlawfully impose the National Electrical Industry Fund on unwilling employers, in violation of Sections 8(b)(1)(B) and 8(b)(3). In this regard, and contrary to your contention on appeal, the burden could not be met of establishing that the International's letters of December 28, 1976 and February 23, 1977 were not reflective of the International's policy. On the contrary, the unambiguous language of these letters, as well as that contained in the June 13, 1978 letter, tends to establish that the International's policy at all times was to request, rather than insist, that the Industry Fund be included during negotiations with non-NECA members. Therefore, these letters were deemed to supercede the more ambiguous language contained in the earlier National Agreement and joint statement. In these circumstances, the five cases in which International representatives, acting as agents of the Locals, were found to have engaged in unlawful conduct were deemed to be inconsistent with this clearly enunciated International policy rather than, as you suggest, consistent with an unlawful International policy. Accordingly, *Sheet Metal Workers International Association (Burt Manufacturing Company)*, 127 NLRB 1629, is distinguishable, in that the misconduct therein on the part of Local officials was within the scope of authority granted by the International. Similarly, the indirect evidence submitted that the International issued unlawful instructions to some of its Locals was deemed insufficient to warrant a contrary conclusion.

The newly discovered evidence submitted in support of the appeal has also been carefully considered in conjunction with that material previously submitted. However, it was concluded that this new evidence would not affect the above determination. Thus, with regard to the statement purportedly made by an International Executive Council member at the January 5, 1977 District 11 construction workshop, it was noted that the conference was held within a month after the IBEW-NECA national agreement was entered into, and there apparently was some confusion on the part of International and Local officials concerning the implementation of some of its new provisions, including the Industry Fund. Moreover, the workshop anteceded International President Pillard's February 23 letter instructing the Locals to bargain in good faith. In addition, in view of the International's established policy against accepting modified letters of assent, together with the fact that apparently no contractors had requested separate negotiations prior to January 5, the member's statement appears to have been made in reference to employers who were then bound by letters of assent. Accordingly, the statement attributed to International Vice President Moore that Locals should attempt to obtain letters of assent from employers that had resigned from NECA membership was not deemed applicable to the member's statement. Further, since the statement was ambiguous, neither the mere presence of the head of the International's construction department nor his memorandum of January 6 were deemed to constitute a ratification of any unlawful International policy. Finally, it was noted that only one meritorious charge was established within District 11's geographical jurisdiction (Case No. 18-CB-855), and, in that case, there was no direct evidence of unlawful International conduct.

With regard to the International's rejection of certain proposed project agreements because, *inter alia*, they did not affirmatively provide for the Industry Fund, it was noted that these agreements are pre-hire agreements negotiated pursuant to Section 8(f) and, accordingly, there is no correspond-

ing duty to bargain in good faith. *Local Union No. 103, Iron Workers v. N.L.R.B.* (Hidgon Construction Company), ___ U.S. ___, 97 LRRM 2333 (1978). Moreover, the project agreements are inherently different from other types of agreements negotiated by IBEW construction Locals, since they are negotiated with general contractors rather than electrical subcontractors. Since the Locals have no way of knowing which electrical subcontractor might be awarded the electrical work, the exclusion of the Industry Fund would be unacceptable to the International in the event the work is awarded to a subcontractor who is signatory to a Local-NECA agreement. Although you have appropriately pointed out that it was the International that initially proffered, as evidence of its lawful course of conduct, various other project agreements that do not provide for the Industry Fund, in considering the totality of the evidence submitted by the parties, these agreements, in and of themselves, were not deemed to constitute probative evidence bearing on the presence or absence of an unlawful nationwide plan.

With regard to the November 1, 1977 letter that you have submitted in support of the appeal, it appears that the contractor involved agreed to sign an unmodified letter of assent. In addition, there was no evidence that the contractor was coerced in any manner. In any event, the letter was deemed to be an isolated incident and, when considered in light of all the evidence, including those cases in which there was direct or circumstantial evidence of International misconduct, was deemed insufficient, standing alone, to warrant a finding of a nationwide plan.

With regard to the Section 8(b)(4)(A) allegation, it was concluded that contributions into the Industry Fund are not the equivalent of "joining" NECA. In this regard, it appears that the Board has never equated the payment of dues as the sole requirement of membership in a labor organization under a union-security provision with the payment of dues, or an equivalent thereof, to an employer association, in the context of Section 8(b)(4)(A).

Finally, with regard to Case No. 8-CB-3563, and contrary to your contention on appeal, *Sheet Metal Workers Local 270 (General Sheet Metal Company)*, 144 NLRB 773, was deemed controlling. See also *Arco Electric Company*, 237 NLRB No. 93.

Accordingly, further proceedings regarding the allegations on appeal were deemed unwarranted.

Very truly yours,

John S. Irving
General Counsel

/s/ By Ronald M. Slatkin
RONALD M. SLATKIN
Acting Director
Office of Appeals

cc: Director, Region 5
Director, Region 6
Director, Region 8
Director, Region 12
Director, Region 15
Director, Region 16
Director, Region 18
Director, Region 23
Director, Region 25
Director, Region 28
Director, Region 31
Director, Region 32
Director, Region 38

Int'l Bro. of Electrical Workers, AFL-CIO, 1125 15th Street,
NW, Washington, D.C. 20005, Attn: Mr. Charles H. Pillard,
Int'l Pres.

The Howard P. Foley Co., 2020 Eye Street, NW, Washington,
D.C. 20006

Commonwealth Electric Company, P.O. Box 81827, Lincoln,
Nebraska 68501 Attn: William Schwartzkoff, Esquire,
General Counsel

IBEW Local Union No. 5, 3500 Grant Bldg., Pittsburgh, Penn-
sylvania, 15219, Attn: Mr. Ray Thompson, Bus. Agent

IBEW Local Union No. 8, P.O. Box 766, Toledo, Ohio 43695,
Attn: Mr. Donald DeBolt and Mr. Phil Couture

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 23-CB-2075

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, LOCAL UNION No. 527

and

NATIONAL CONSTRUCTORS ASSOCIATION

and

SOUTHEAST TEXAS CHAPTER, NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION

Party of Interest

and

Case No. 23-CB-2074

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
AFL-CIO, LOCAL UNION No. 716

and

NATIONAL CONSTRUCTORS ASSOCIATION

and

SOUTHEAST TEXAS CHAPTER, NATIONAL
ELECTRICAL CONTRACTORS ASSOCIATION

Party of Interest

Ruth Small, for the General Counsel.

*Peter R. Spanos, on behalf of Stokes & Shapiro, for the
Charging Party.*

*Howard J. Kaufman, on behalf of Zimmerman & Obadal,
for the Charging Party.*

*Wiley Doran, on behalf of Mitchell & Doran, for
Respondent IBEW, Local 527.*

James R. Watson, Jr., on behalf of *Bray & Watson*, for Respondent IBEW, Local 716.

Gerald T. Holtzman, on behalf of *Holtzman, Evans & Urquhart*, for the Party of Interest, Southeast Texas Chapter, National Electrical Contractors Association.

DECISION

Statement of the Case

JERROLD H. SHAPIRO, Administrative Law Judge: The hearing in these cases was conducted March 14, 1978, and is based upon an unfair labor practice charge filed on October 20, 1977, in Case No. 23-CB-2075 by the National Constructors Association, herein called the NCA, against the International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 527, herein called Respondent IBEW Local 527, and another charge filed by NCA the same date in Case No. 23-CB-2074 against International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 716, herein called Respondent IBEW Local 716. On June 30, 1978, the General Counsel of the National Labor Relations Board issued a complaint against Respondent IBEW Local 527 in Case No. 23-CB-2075 and on July 7, 1978, issued a complaint against Respondent IBEW Local 716 in Case No. 23-CB-2074 and on July 12, 1978, issued an Order consolidating these cases for hearing. The complaints, in substance, allege that Respondents violated Section 8(b)(3) and (1)(B) of the National Labor Relations Act, as amended, herein called the Act, by insisting to the point of impasse that Howard F. Foley Co., herein called Foley, accept a nonmandatory subject of bargaining, the National Electrical Industry Fund, as a part of a collective-bargaining agreement and threatened to strike Foley if it refused to accede to this demand. Respondents filed timely answers denying the commission of the alleged unfair labor practices.¹

¹ In their respective answers Respondents admit they are labor organizations within the meaning of Section 2(5) of the Act. Also they admit that NCA, Foley, and the National Electrical Contractors

Upon the entire record, and from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs, I make the following:

Findings of Fact

I. The Alleged Unfair Labor Practices

A. The Facts

1. The setting

Foley is an electrical contractor doing business in the construction industry. In 1976 Foley, by virtue of its membership in the National Electrical Contractors Association, herein called NECA, was a party to separate collective-bargaining agreements with Respondents, IBEW Local 527 and IBEW Local 716, covering the Company's electricians employed in the geographical jurisdiction of these unions—southeast Texas. Foley's contract with Local 716 was scheduled to terminate May 31, 1977, and its contract with Local 527 was scheduled to terminate September 6, 1977.

On December 3, 1976, Foley wrote Respondents that as of that date it had resigned its membership in the NECA and that the NECA no longer had the authority to bargain on its behalf and that any contracts negotiated between the NECA and the International Brotherhood of Electrical Workers, herein called the IBEW, and its affiliated locals, after the expiration of the current contract would not bind Foley because Foley intended to bargain with the IBEW and its affiliated locals on an individual basis. On December 10, 1976, Foley wrote Respondents it intended to terminate its current contracts with these unions as of the termination dates set forth in the con-

Association and its Southeast Texas Chapter are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act and meet the Board's applicable discretionary jurisdictional standard.

tracts. These letters constituted timely notices of termination under the terms of the respective contracts.

On December 8, 1976, the IBEW, on behalf of its affiliated local unions, and the NECA, on behalf of those employers who had designated it as their collective-bargaining representative, entered into an agreement effective July 1, 1977. This agreement, among other things, established a trust called the National Electrical Industry Fund, herein called the NEIF. The agreement provided that employers covered by said agreement would contribute 1 percent of their gross labor payroll into the NEIF. The Declaration of Trust creating the NEIF provides for its administration by trustees appointed by the NECA Executive Committee. In addition, the Declaration of Trust states that the purposes of the NEIF "are limited solely to the following activities":

1. To engage in advertising, publicity and promotional activities which will advise the public at large of the nature, extent and availability of the services performed by the electrical contracting industry.
2. To engage in educational research and experimentation programs directed at the formulation of uniform electrical specifications and high quality of electrical construction.
3. To engage in programs and activities directed at assisting architects, engineers, specification writers, general contractors and governmental authorities in the formulation or improvement of governmental codes and other technical and safety programs.
4. To engage in programs to acquaint employees with the purpose and use of new products as they are available.
5. To provide training for journeymen, management and sales personnel employed in the electrical contracting industry.
6. To engage in programs and activities directed toward acquainting employees with governmental safety regulations and industry policy as well as training for such employees in first aid and other safety programs and methods.

7. To engage in market surveys concerning employment and business opportunities and the collection of other needed statistical information concerning the industry.

8. To engage in programs and activities directed at promoting sound labor relations in the industry.

9. To pay the employer's costs of collective bargaining.

10. To pay the employer representatives expenses and the Association's costs in the operation of the Council on Industrial Relations for the Electrical Contracting Industry.

11. To pay the Association's costs and expenses in support of the operations of the National Joint Apprenticeship and Training Committee.

12. To pay all operating costs and the expenses incurred by the Association in the administration and carrying out of the purposes as well as the compensation for personnel of the Association engaged in programs and activities outlined herein.

2. Case No. 23-CB-2074

As described *supra*, in December 1976 Foley notified Respondent IBEW Local 527 that it intended to terminate its collective-bargaining agreement with the Union on May 31, 1977, which was the agreement's termination date, and also notified Local 527 that it had resigned from NECA and intended to bargain on an individual basis, as a single employer, with the Union. Also as described *supra*, in December 1976 the NECA negotiated an agreement with the IBEW providing for the inclusion in all NECA-IBEW contracts of a provision establishing a National Electrical Industry Fund (NEIF) and for employer contributions into this Fund effective July 1, 1977.

On February 23, 1977, the IBEW's International President, Charles Pillard, wrote Ronald Raspberry, the business manager of Local 716, stating that the IBEW had been informed that Foley had terminated its Letter of Assent-A wherein it had

authorized the NECA to represent it for purposes of collective bargaining and that although Foley intended to honor its current collective-bargaining agreements with the IBEW that Foley had stated it would not contribute into the NEIF inasmuch as it was only a voluntary subject of bargaining. Pillard's letter reminded Raspberry that when Foley's current contract with Local 716 terminated on May 31, 1977, if no new contract was reached, that Local 716 was not obliged to furnish Foley with labor. And, concerning Local 716's collective-bargaining obligation when its current contract with Foley terminated, Pillard's letter instructs Raspberry as follows:

The Local Union must, if requested by [Foley], enter into separate negotiations with [Foley] and must, in accordance with Section 8(b)(3) of the National Labor Relations Act, as amended, bargain in good faith. The Local Union must bargain for a complete agreement, and may not simply insist on a 'take-it-or-leave-it' basis, that [Foley] accept all of the terms of the Local's agreement with [NECA] or sign a new Letter of Assent. The Local may, however, request and bargain for all items the Local Union has tried to secure from NECA or other electrical contractors as proposed by the members of the Local Union, such as wages, a shorter workday, double time, paid holidays, vacation, health and welfare, pension, travel time, general foreman ratio, etc. Local Unions may negotiate for better terms or conditions.

On approximately May 18, 1977, Raspberry prepared a letter addressed to all of Foley's employees which concerned the termination of Foley's contract with Local 716. The letter informed the employees that Foley had notified the Union of its withdrawal from NECA and its intent to terminate its contract with the Union effective May 31, 1977. It also informed the employees that Foley had taken exception to certain provisions included in the national contract between NECA and the IBEW and that these provisions had been inserted into the new local agreement between Local 716 and the local chapter of NECA effective June 1, 1977. The letter concluded: "As of this date Local Union 716, IBEW has not received an offer to talk contract with [Foley]. If no agreement has been reached by

June 1, 1977, anyone reporting to work on June 2, 1977, will be working for an employer who is considered in difficulty with the IBEW. Also, he could be considered in violation of several sections of the IBEW Constitution and Bylaws of Local Union 716, IBEW."

As of May 19, 1977, the representatives of Foley and Local 716 had not met to negotiate the terms of a new agreement to supersede the one which was scheduled to terminate May 31, 1977, nor had there been an effort on the part of these parties to meet for this purpose. On May 19, 1977, Foley's branch manager Neal Sudick, accompanied by Foley's outside superintendent "Red" Porter, met for lunch with Local 716's business manager Ronald Raspberry. Sudick, prior to this meeting had prepared a letter dated May 18, 1977, addressed to Raspberry which stated that because the Company's current contract with Local 716 was scheduled to terminate May 31, 1977, that Sudick was enclosing a "Letter of Assent-B" executed by the Company which bound the Company to all of the terms and conditions of the current collective-bargaining contract between NECA and Local 716 except for the NEIF. The Letter of Assent-B, referred to by Sudick's letter, is a standard letter used by the IBEW which is signed by employers who have not designated NECA to bargain with the IBEW, but want to be bound by the terms of the contract negotiated by NECA and IBEW. The particular Letter of Assent-B which Sudick had executed and enclosed in his letter to Raspberry contained the standard language usually included in such a Letter of Assent whereby the employer agrees to comply with all of the terms and conditions of employment contained in the NECA-IBEW contract and all approved amendments. However, Sudick had changed the standard language in one significant respect by adding a proviso that Foley would agree to comply with all the terms and conditions of employment contained in the aforesaid contract and any amendments thereto "except for any provisions establishing an Industry Fund [referring to the NEIF]."

On May 19, 1977, at their luncheon meeting Sudick handed Raspberry the aforesaid Letter of Assent-B and the letter

which accompanied it. Raspberry stated he could not sign the "Letter of Assent-B" executed by Sudick. Sudick asked for an explanation. Raspberry pointed to the proviso added by Sudick which excluded the NEIF. Sudick asked what Raspberry wanted him to do. Raspberry stated that Foley and Local 716 had to negotiate an entire collective-bargaining agreement. Sudick stated that the Company had a long collective-bargaining relationship with the IBEW and wanted to continue the relationship and wanted to work under all of the terms of the NECA-IBEW contract except for the NEIF which was the only objectionable provision. Raspberry stated that all of the provisions included in the IBEW's contract with NECA were collectively bargained for and because of this Foley could not take all but one of the provisions. Raspberry stated that Foley would have to bargain for an entire contract with Local 716 rather than require Local 716 to accept the terms of the NECA contract minus the NEIF provision. Sudick replied that Foley did not want to do this. Raspberry stated that Local 716 needed some kind of an agreement with Foley by June 1 when the current contract terminated. Sudick asked what would happen June 1. Raspberry showed him the letter of May 19, described *supra*, prepared by Raspberry for circulation to Foley's employees, which indicated that absent a new contract Foley's electrical workers would be punished by the IBEW if they continued to work for Foley. At this point Sudick indicated that he would sign the Letter of Assent-B, without modification, and let the "big boys" in management worry about the matter.²

² The description of the May 19 meeting is based upon Raspberry's testimony. Sudick testified that when he handed Raspberry the Letter of Assent that Raspberry refused to sign it stating that prior to the termination date of the parties' current contract Sudick had to accept the Letter of Assent in its entirety without any change and, when Sudick asked what Foley had to do to continue to employ Local 716 workers, Raspberry stated Sudick must sign the Letter of As-

On about May 24, 1977, Sudick executed a "Letter of Assent-B" without modification whereby Foley agreed to comply with all of the terms and conditions of employment included in the contract between Local 716 and NECA and any approved amendments thereto. Sudick transmitted this Letter of Assent to Raspberry with a covering letter which in substance stated that he had signed the Letter of Assent "under protest" over the inclusion of the NEIF and had signed it because the Company was dependent upon Local 716 to furnish it with labor to complete its work in progress.

3. Case No. 23-CB-2075

As described *supra*, in December 1976 Foley notified Respondent IBEW Local 527 that it intended to terminate its collective-bargaining agreement with the Union on September 6, 1977, which was the agreement's termination date, and also notified Local 527 that it had resigned from NECA and intended to bargain on an individual basis, as a single employer,

sent unaltered. Sudick further testified that at that point he agreed to sign the unrevised Letter of Assent and told Raspberry he was doing so under protest over the inclusion of the NEIF. Sudick further testified that Raspberry did not present him with an alternative other than to sign the unrevised Letter of Assent and did not show him the letter addressed to employees. I have rejected Sudick's testimony inasmuch as his demeanor was not that of a trustworthy witness, whereas Raspberry impressed me as a sincere and reliable witness. In addition, although this meeting lasted for at least 1 hour, Sudick's recollection of what was discussed concerning the collective-bargaining agreement was exceedingly vague and for some unexplained reason an alleged contemporaneous memorandum he took of the conversation was not with him at the hearing and was apparently never shown to the Counsel for the General Counsel. Finally, it is highly significant that superintendent Porter, who was present throughout the hearing in this case was not called upon to corroborate Sudick's testimony.

with the Union. Also as described *supra*, in December 1976 NECA, on behalf of the employers whom it represented, negotiated an agreement with the IBEW providing for the inclusion in all NECA-IBEW contracts of a provision establishing a National Electrical Industry Fund (NEIF) and for employer contributions into this Fund effective July 1, 1977.

In July 1977 Local 527's business manager, Charles Delgado, phoned Neal Sudick, Foley's branch manager, and asked for the Company's position concerning the NEIF. Sudick stated he did not know, but would speak with Delgado about the matter at a later date.

The initial employer contributions into the NEIF were due August 18, 1977. On August 17, 1977, Sudick phoned Delgado and told him that Foley would comply with all of the provisions of its contract with Local 527 which was scheduled to terminate September 6, 1977, except for the NEIF contributions. Sudick asked for Local 527's position. Delgado stated that Foley's contributions into the NEIF were due August 18 and if they were not paid, that Foley would be in violation of its contract with Local 527 and Delgado would have no choice but to remove all of the Company's electricians from their jobs. Delgado then asked what Foley intended to do about "the new agreement." Sudick replied that the subject of a new collective-bargaining agreement was another problem and Sudick would discuss it with Delgado at a later date.

The next day, August 18, Sudick phoned Delgado. Sudick stated that Delgado had convinced him that the only way Foley could keep its employees working was to contribute into the NEIF.³ Delgado stated Foley would have to contribute

³ Foley contributed into the NEIF for the remainder of its contract with Local 527.

into the Fund "at least until September 5" when Foley's contract with Local 527 terminated. On the subject of what would happen when Foley's contract terminated, Delgado informed Sudick that he had no knowledge of Foley's plans after September 5, 1977, so he would just wait and see what Foley did, but pointed out to Sudick that Foley would need either "a new agreement or a new letter of assent" and should not wait until the last minute to try to resolve the situation. Sudick indicated he agreed.

The next communication between the parties concerning a new collective-bargaining agreement took place on September 6, 1977, the day Foley's contract with Local 527 was scheduled to terminate. On September 6 Sudick wrote Delgado stating that inasmuch as the Company's contract with the Union expired on that date that Sudick had enclosed a Letter of Assent-B executed by Sudick on behalf of the Company which bound the Company to all of the terms of the contract between NECA and Local 527 except for the NEIF provision. The Letter of Assent-B referred to by Sudick is a form letter used by the IBEW which is signed by employers who have not designated NECA to bargain on their behalf, but desire to be bound by the terms of the contract negotiated by NECA and the IBEW. The Letter of Assent-B executed by Sudick included language normally included in such a letter. In essence, a Letter of Assent-B provides that the signatory employer agrees to comply with all of the terms and conditions of employment contained in the collective-bargaining agreement between Local 527 and the NECA and any approved amendments thereto. However, Sudick changed the standard language in one significant respect by adding a proviso stating that Foley would agree to comply with all of the terms and conditions of employment contained in the aforesaid contract and any approved amendments thereto "with the exception for any provision establishing an industry fund [referring to the NEIF] which this contractor elects not to participate."

On September 10, 1977, Delgado, upon receipt of the Letter of Assent executed by Sudick, phoned Sudick. Delgado stated

he "could not accept a modified Letter of Assent-B" but that Sudick would have to accept the Letter of Assent in its entirety. Sudick replied that he had to continue to man his jobs using Local 527 labor and because of this would sign the Letter of Assent without any modification but would do so under protest. Delgado stated that this was "fine."

On September 19, 1977, Sudick executed a Letter of Assent-B whereby Foley, without qualification, agreed to comply with all of the terms and conditions of employment contained in the contract between Local 527 and NECA, including any approved amendments. Sudick mailed this Letter of Assent to Delgado and by covering letter pointed out to Delgado that Foley had signed the Letter of Assent under protest over the inclusion of the NEIF and that this was the only provision that Foley was protesting.

B. Conclusionary Findings

It is settled that industry promotion funds similar to the NEIF are nonmandatory subjects of bargaining which may be proposed by the parties during negotiations but not insisted upon as a condition of entering into a collective-bargaining agreement. *Metropolitan District Council of Philadelphia, etc. (McCloskey Floor Covering, Inc.)*, 137 NLRB 1583; *Detroit Resilient Floor Covering Local Union No. 2265 (Mill Floor Covering, Inc.)*, 136 NLRB 769; *Local 264, Laborers International Union (D & G Construction)*, 216 NLRB 40. Likewise it is settled that an employer's acceptance of an industry promotion fund a similar to the NEIF, in effect, amounts to a designation of the trustees of the fund as its collective-bargaining representative with respect to the subjects included therein. *Metropolitan District Council of Philadelphia, etc.*, *supra*; *Local 264, Laborers International Union*, *supra*. Thus, if the Respondents insisted as a condition of agreement that Foley incorporate the NEIF in its contracts with them, Respondents violated Section 8(b)(3) of the Act and if this demand was accompanied by a threat of a strike or other coercion the Respondents further violated Section 8(b)(1)(B) of

the Act. See, *Metropolitan District Council of Philadelphia, etc., supra*; *Local 264, Laborers International Union, supra*. I am of the opinion, for reasons set forth *infra*, that the record fails to establish that Respondents insisted upon the inclusion of the NEIF in their contracts with Foley to the point of impasse or that Respondents threatened Foley with a strike or to engage in other coercive conduct if Foley refused to accept a contract which included the NEIF.

1. Case No. 23-CB-2075

General Counsel and Charging Party contend that despite Foley's opposition to the NEIF provision that Local 527's business manager, Delgado, on September 10, 1977, informed Foley's branch manager, Sudick, that the only collective-bargaining agreement acceptable to Local 527 was one which included the NEIF. In other words, Local 527 insisted to the point of impasse that Foley accept the NEIF. An examination of the record belies this contention.

In December 1976 Foley informed Local 527 that it intended to terminate its contract with the Union on September 16, 1977, the date it expired, and negotiate the terms of a new contract on its own behalf. But thereafter Foley did nothing about negotiating a new contract with Local 527 until September 16, 1977, the date the current contract terminated. There is no evidence or contention that Local 527, prior to September 16, refused to meet or avoided meeting with Foley to negotiate the terms of a new contract. Quite the contrary, on August 18, 1977, Local 527's business manager, Delgado, cautioned Foley's branch manager, Sudick, that the Company should not wait until the last minute to commence contract negotiations. Nevertheless, Foley waited until the day the contract terminated before commencing contract negotiations. On that date, by mail, Sudick proposed in effect that Local 527 and Foley enter into a contract identical to Local 527's contract with NECA except for one provision, the NEIF. Upon receipt of this proposal, Delgado phoned Sudick and, in effect, advised him that if Foley wanted to enter into a collective-bargaining

agreement whereby it agreed to abide by the terms of Local 527's contract with NECA that Foley would have to accept all of the terms of the NECA contract, including the NEIF. It was at that time Sudick accepted all of the terms in the NECA contract, including the NEIF.

In my opinion there is a lack of evidence that when Sudick indicated his acceptance of the NECA contract, including the NEIF, there was "no realistic possibility that continuation of discussion at that time would have been fruitful." *American Federation of Television and Radio Artists v. N.L.R.B.*, 395 F.2d 622, 628 (C.A.D.C.). Neither Delgado nor any other representative of Local 527 had ever indicated to Foley that Local 527 would only agree to a collective-bargaining contract which contained the NEIF. Rather, in reply to Sudick's proposal that Local 527 agree to all of the terms included in the NECA contract except for the NEIF, Delgado indicated Local 527 would only agree to Sudick's proposal if it included the NEIF. Whether Local 527's representatives during subsequent bargaining sessions would have insisted that Foley include the NEIF provision in any contract negotiated between the parties is pure conjecture inasmuch as Foley never put Local 527 to the test by engaging in contract negotiations. For, as soon as Delgado rejected Sudick's proposal that Local 527 accept the NECA contract minus the NEIF provision, Sudick, instead of engaging in further negotiations, abruptly accepted the NECA contract in its entirety because he thought that since Foley's contract with Local 527 had terminated, that Local 527 would stop furnishing Foley with electricians which it needed to complete its jobs in progress.

Based upon the foregoing, I am of the opinion that this is not a situation where the evidence reveals that Local 527, despite its knowledge of Foley's opposition to the NEIF, was unwilling to engage in good-faith bargaining for a contract without the NEIF provision or that Local 527 insisted to the point of impasse that Foley agree to a contract which included the NEIF provision. It is for these reasons that I shall recommend that the complaint in Case No. 23-CB-2075 be dismissed in its entirety.

2. Case No. 23-CB-2074

Here, as was the case involving Local 527, I am not persuaded that the record establishes that Local 716, in its contract negotiations with Foley, insisted upon the NEIF as a condition of entering into a collective-bargaining contract. Thus, on May 19, 1977, at the parties' first negotiation meeting, Foley's branch manager, Sudick, proposed that Local 716 and Foley enter into a collective-bargaining contract which included all of the terms of Local 716's contract with NECA except for one provision, the NEIF. In support of this proposal Sudick explained to Local 716's business manager, Raspberry, that Foley, when it was represented by NECA, had enjoyed a long collective-bargaining relationship with Local 716 and desired to continue this relationship even though NECA no longer represented the Company and that the only provision in NECA's contract with Local 716 that Foley objected to was the NEIF. Sudick stated that Foley wanted to work under the NECA contract except for the NEIF. Raspberry rejected this proposal. He explained to Sudick that Foley would have to negotiate an entire collective-bargaining agreement with Local 716, that the provisions in the NECA contract had been collectively bargained for and because of this Foley could not take all but one of them, but would have to bargain for an entire contract. Sudick replied that Foley did not want to do this but wanted Local 716 to accept the NECA contract minus the NEIF provision. Raspberry rejected this proposal and warned that if Foley and Local 716 did not reach agreement by June 1, 1977, when Foley's contract terminated, that Local 716 would call its employees out on strike. At that point Sudick agreed to sign an unrevised Letter of Assent-B whereby Foley agreed to abide by all of the terms of the NECA contract, including the NEIF.

In my opinion there is a lack of evidence that when Sudick indicated his acceptance of the NECA contract, including the NEIF, that there was "no realistic possibility that continuation of discussion at that time would have been fruitful." *American Federation of Television and Radio Artists v. N.L.R.B.*,

395 F.2d 622, 628 (C.A.D.C.). Neither Raspberry nor any other representative of Local 716 had indicated to a representative of Foley that Local 716 would only agree to a contract which contained the NEIF. Rather, in rejecting Sudik's proposal that Local 716 agree to the NECA contract, except for the NEIF provision, Raspberry explained to him that all of the terms of the NECA contract had been bargained for collectively as a part of a package and because of this Raspberry could not agree to enter into a contract which included all but one of the terms.⁴ Whether during subsequent bargaining sessions Raspberry would have insisted that Foley include the NEIF provision in any contract negotiated between the parties to pure conjecture inasmuch as Sudick never put Raspberry to the test by engaging in the contract negotiations that Raspberry requested.⁵ Rather Sudick refused to engage in further collective bargaining, but instead accepted the NECA contract in its entirety apparently to avoid a strike which would have shortly taken place if Foley's contract with Local 716 had lapsed without a new contract having been reached.

Based upon the foregoing, I am of the opinion that this is not a situation where the evidence reveals that Local 716, despite its knowledge of Foley's opposition to the NEIF, was unwilling to engage in good-faith bargaining for a contract without the NEIF, or that Local 716 insisted to the point of impasse that Foley agree to a contract which included the NEIF. It is for

⁴ In view of Foley's removal of the NEIF provision from the NECA contract, Local 716 in bargaining with Foley was entitled to alter the other provisions contained in the NECA contract which were mandatory subjects of bargaining. Cf. *Nordstrom Inc.*, 229 NLRB 601.

⁵ The fact that the NECA contract contained a so-called "most favored nations clause" does not, by itself, establish that Raspberry was committed to insisting that Foley sign a contract which included the NEIF. This is especially true where, as here, there is no evidence that Local 716 has insisted that all of its contracts contain the NEIF.

these reasons that I shall recommend that the complaint in Case No. 23-CB-2074 be dismissed in its entirety.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁶

ORDER

It is hereby ordered that the complaints in Case No. 23-CB-2074 and Case No. 23-CB-2075 be, and they hereby are, dismissed in their entirety.

Dated: May 31 1979

/s/ Jerrold H. Shapiro
JERROLD H. SHAPIRO
Administrative Law Judge

⁶ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case 27-CB-1218

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL NO. 12 (Commonwealth Electric Company)

and

RAYMOND BOSCHE, an Individual

Daniel C. Ferguson of Denver, Colo., Counsel for the
General Counsel.

Howard E. Erickson of *Erickson & Quigley* of Denver,
Colo., Attorney for the Respondent.

DECISION

Roger B. Holmes, Administrative Law Judge: The unfair labor practice charge in this proceeding was filed on May 1, 1978, by Raymond Bosche, an individual.

The Regional Director of Region 27 of the National Labor Relations Board, herein called the Board, who was acting on behalf of the General Counsel of the Board, issued on June 23, 1978, a complaint and notice of hearing against International Brotherhood of Electrical Workers, Local No. 12, herein called the Respondent.

The General Counsel's complaint alleges that the Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act, herein called the Act.

In summary, the General Counsel contends: (1) that the Respondent levied fines on or about March 6, 1978, against eight members of the Respondent, who had worked for Commonwealth Electric Company, herein called the Employer,

during the time of a strike and picketing by the Respondent involving the Employer, and (2) the strike and the picketing by the Respondent since on or about July 18, 1977, were in support of the Respondent's insistence to impasse that the Employer agree to a nonmandatory subject of bargaining, i.e., the National Electrical Industry Fund. (See General Counsel's Exhibit 1(c) for the specific allegations made by the General Counsel and see the arguments set forth at pages 6, 7 and 8 of the counsel for the General Counsel's Brief.)

The Respondent filed an answer to the General Counsel's complaint and denied the commission of the alleged unfair labor practices. (See General Counsel's Exhibit 1(e).)

In summary, the Respondent contends that it did not insist to impasse on a nonmandatory subject of bargaining with the Employer. The attorney for the Respondent stated at page 8 of his brief: "There is no dispute that the industry fund is a nonmandatory subject of bargaining but it may be proposed, even though it cannot be insisted upon as a condition of entering into a collective bargaining agreement." The Respondent contends that it was agreeable to negotiating a separate agreement with the Employer, and that it did not condition agreement on inclusion of industry fund payments. The Respondent further urges that the eight members were fined for the reasons set forth in Joint Exhibit 43.

The trial was held before me on October 26, 1979, at Denver, Colorado. The time for filing briefs was extended to December 17, 1979. Both the Counsel for the General Counsel and the attorney for the Respondent filed briefs.

Findings of Fact

1. The Employer

The Employer is a Delaware corporation with an office and place of business located at Pueblo, Colorado, where it is engaged in the electrical construction business.

In the course and conduct of its business operations within the State of Colorado, the Employer annually purchases and

receives goods and materials valued in excess of \$50,000 directly from outside the State of Colorado.

Upon the foregoing facts and the entire record herein, I find that the Employer has been, at all times material herein, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union

It was admitted in the pleadings that the Respondent has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act. Based upon the pleadings, and the entire record herein, I find that fact to be so.

3. The Witnesses

In alphabetical order by their last names, the following three persons appeared as witnesses at the trial in this proceeding:

Lawrence C. Farnan has been the District International Vice President of the International Brotherhood of Electrical Workers since April 1, 1976.

Robert D. Grinstead has been for the past 17 years the Business Manager and the Financial Secretary of the Respondent.

William Schwartzkopf has been the Vice President and the General Counsel of the Employer since July 1977. Prior to that time, he held the position of General Counsel of the Employer.

4. Credibility Resolutions

In making the findings of fact herein, I have based the findings upon portions of the testimony of each one of the three witnesses who testified in this proceeding. In addition, I have relied upon the extensive amount of documentary evidence introduced by the parties.

Of course, in evaluating the testimony, I have given consideration to the positions occupied by the witnesses, and their potential interests in the outcome of the litigation. There are

some minor variations in the testimony, but these are not truly significant in resolving the issues presented by the pleadings. For example, the recitals regarding the conversation between Schwartzkopf and Farnan in September 1977 varied to a minor degree, but those accounts are not directly in conflict. I will set forth herein the facts which appear to me to be more credible.

Not surprisingly, the witnesses view the facts from different perspectives, and they would draw different conclusions from the facts as they see them. For example, the question of whether the Employer and the Respondent were bound to the Colorado Statewide Line Agreement is one issue which separated the parties. Thus, I am not suggesting that there are no factual issues between the parties. However, as indicated above, I found the testimony by all three witnesses to be believable. Therefore, I have relied upon portions of the testimony from each one of them. Additionally, the documentary evidence offered at the trial forms the basis for numerous findings of fact.

5. Joint Exhibit 1 and Joint Exhibit 42

Paragraph V of the General Counsel's complaint was admitted to be true. It states as follows:

At all times material herein, the Respondent has been the representative for the purposes of collective bargaining of a unit of outside electrical workers employed by the Employer, which is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, and by virtue of Section 9(a) of the Act the Respondent has been at all times material, and is now, the exclusive collective bargaining representative of all said employees.

Introduced into evidence as Joint Exhibit 1 was a document which is entitled "Letter of Assent—B." That document is between the Employer and Local 969 of the IBEW. The document provides, among other things, that the Employer will comply with all of the terms and conditions of employment contained in the Colorado Statewide Line Agreement between the Western Line Constructors Chapter, Inc. and Local 969 of

the IBEW. Joint Exhibit 1 is dated April 26, 1976, and it provides that it would remain in effect until October 31, 1976, which is described as the "termination date."

A copy of the Colorado Statewide Line Agreement was introduced into evidence as Joint Exhibit 42. The document states that it is an agreement between the Western Line Constructors Chapter, Inc., N.E.C.A. and Local Unions No. 12, 111, 113 and 969 of the IBEW. The document further states, "It shall apply to all firms who sign a letter of assent to be bound by this agreement." (See page 1 of Joint Exhibit 42.) The effective dates of Joint Exhibit 42 are contained in section 1.1 of Article 1 of the document. It provides, "This Agreement, amended, shall take effect on November 1, 1976, and shall remain in effect through October 31, 1977. It shall remain in effect from year to year thereafter from November 1, through October 31, of any year unless changed or terminated in the way provided herein."

The explanation why there was not a Letter of Assent—B between the Employer and the Respondent in this case was stated in a letter from Business Manager Grinstead to the International President of IBEW, as follows, "By virtue of this Company being signatory to the Colorado Statewide Line Agreements by another Colorado Local, we did not feel it was necessary to further bind them to the same Statewide agreement."

While Vice President and General Counsel Schwartzkopf expressed the opinion at the trial that the Employer was bound to the Colorado Statewide Line Agreement with the Respondent herein, he acknowledged that an extensive search of the Employer's files revealed no Letter of Assent dated after Joint Exhibit 1. He further acknowledged that the Employer had not signed Joint Exhibit 42.

Grinstead also stated at the trial that he had checked the Respondent's records, and that Joint Exhibit 1 was the only document which the Respondent had. Grinstead further stated that he had also made inquiries with the other three local

unions of the IBEW in Colorado and also with the International Office of the IBEW, and that no agreement was produced which had been signed by the Employer.

The main difference between a Letter of Assent—B and a Letter of Assent—A was explained by Vice President Farnan as being one which related to the effective dates of the document. A letter of Assent—A is an ongoing agreement, whereas a Letter of Assent—B has a fixed termination date.

The Employer had been involved in the construction of a transmission line in Colorado, which was described as the Bayfield Pagosa Project. The work was conducted during July, August, September, October and November 1976. The project was shut down on December 10, 1976, by agreement with the United States Forest Service and the Bureau of Land Management, which agencies managed or owned the lands on which the Employer was primarily working.

6. The Employer Withdraws from the Western Line Constructors Chapter of N.E.C.A.

By letter dated January 27, 1977, from the President of the Employer to the Respondent, the Employer advised the Respondent that it was resigning from the Western Line Constructors Chapter of the National Electrical Contractors Association. A copy of the letter was introduced into evidence as Joint Exhibit 2. In pertinent part, it provides:

We enclose a copy of our letter of this date resigning from the local chapter of the National Electrical Contractors Association which has an agreement with your local union. As a result of such withdrawal such local chapter is henceforth without authority to act for Commonwealth Electric Company in any matter.

This withdrawal in no way affects any existing agreement with your local union. Commonwealth Electric Company will continue to recognize your local union as the exclusive bargaining representative of its employees covered by the agreement. Commonwealth Electric Company will not be bound by any future agreements or any amendment to existing agreements negotiated by such local chapter.

Schwartzkopf explained the reason for the withdrawal from the Western Line Constructors Chapter as being the creation of a National Electrical Industry Fund by N.E.C.A. and IBEW. Schwartzkopf stated that the Employer withdrew from that organization because, "... we were completely opposed to the fund and as a result, we withdrew from N.E.C.A." Schwartzkopf explained that contributions to the National Electrical Industry Fund would have increased monetary costs to the Employer. The Employer is a plaintiff in a lawsuit against N.E.C.A. regarding that fund.

7. The Letter to the Respondent from the IBEW International President

Introduced into evidence as Joint Exhibit 4 was a copy of a letter dated March 3, 1977, to the Respondent from Charles H. Pillard, International President of IBEW. In pertinent part, it stated:

We have received numerous copies of letters from Commonwealth Electric Company to IBEW Local Unions advising that the Commonwealth Electric Company is terminating Letters of Assent to the Local Union Construction Agreements.

Even though our records indicate that we have no current Assent in our file between your Local Union and Commonwealth Electric Company, we do have a copy of a letter dated January 27, 1977, from Commonwealth Electric Company sent to Local Union 12, IBEW, advising that they have withdrawn from NECA, therefore, no longer recognizing that organization as their collective bargaining representative. However, they will continue to recognize your Local as the exclusive bargaining representative for its employees under the existing agreement.

Apparently, this employer is anticipating work in your area or is performing work in your area and you have not submitted the Assent to this office for processing.

The Letter of Assent "A" (Form 302) requires the employer to give written notice to the Chapter and the Local Union at least 150 days prior to the then anniversary date of the current approved labor agreement.

The Letter of Assent "B" (Form 303) differs from the Letter of Assent "A" wherein it contains a definite termination date. Where the employer terminates its agreement (Letter of Assent), it has no agreement with the Local Union or the IBEW.

The Commonwealth Electric Company states in its letters that it is their intent to continue to abide by the Local Union agreement with one exception, the Industry Fund payments that go to NECA, and states that, "Industry Funds are clearly, under the law, a voluntary subject of bargaining."

This is true, but has no bearing on the legality of the IBEW-NECA Agreement providing for an Industry Fund. The IBEW and NECA mutually agreed to this Industry Fund. All employers signatory to Letters of Assent are expected to abide by the agreement in its entirety and no employer may unilaterally change the collective bargaining agreement.

Where Commonwealth Electric Company terminates agreements (Letters of Assent), it has no agreement with the Local Union or the IBEW. IBEW Local Unions are not, of course, under any obligation to furnish men to any contractor without an agreement.

The Local Union must, if requested by Commonwealth Electric Company, enter into separate negotiations with the Commonwealth Electric Company and must, in accordance with Section 8(b)(3) of the National Labor Relations Act, as amended, bargain in good faith. The Local Union must bargain for a complete agreement and may not simply insist, on a "take-it-or-leave it" basis, that the Commonwealth Electric Company accept all of the terms of the Local's agreement with the Chapter or sign a new Letter of Assent. The Local may, however, request and bargain for all items the Local Union has tried to secure from NECA or other electrical contractors as proposed by the members of the Local Union, such as wages, a shorter workday, double-time, paid holidays, vacation, health and welfare, pension, travel time, general foreman ratio, etc. Local Unions may negotiate for better terms and conditions; however, they need not settle for lesser terms and conditions.

8. The Respondent's Letter dated March 8, 1977, to the Employer

Introduced into evidence as Joint Exhibit 6 was a copy of a letter dated March 8, 1977, from Grinstead to the Employer. In pertinent part, it stated:

In reply to your letter of January 27, 1977, and the enclosed copy of your Company's resignation from N.E.C.A., please find enclosed Letters of Assent "B" for the various Colorado Line Agreements.

As you are probably aware, the Colorado Line Agreements do cover the entire State, and four Local Unions are parties to the agreements; Local's 12, 111, 113 and 969.

Since your letter states in part, "This withdrawal, (from N.E.C.A.), in no way affects any existing agreement with your Local Union(s)" we will appreciate the prompt return of the enclosed Letters of Assent B. We do anticipate additional amendments to these agreements *during* the specified dates in the Letters of Assent B, and are therefore curious as to the last sentence in your letter.

Please advise us if you choose not to sign the enclosed Letters of Assent, because without these, your Company is not signatory to the I.B.E.W. in Colorado for Line Construction work.

9. The Employer's Response

The Employer responded to Joint Exhibit 6 by a letter dated March 14, 1977. (See Joint Exhibit 8.) Enclosed with Joint Exhibit 8 were copies of "Letter of Assent—B." As indicated in Joint Exhibit 6, Grinstead had previously signed those documents. Paul C. Schorr, III, as the President of the Employer, executed the documents on behalf of the Employer. However, at the direction of Schwartzkopf, a sentence was added to the documents above the signature of Grinstead. The addition to the documents stated, "Except that amendments or provisions providing for payments to the National Electrical Industry Fund or any other equivalent or similar fund shall not apply to the undersigned employer." (See Joint Exhibit 9.)

The foregoing prompted still another letter from Grinstead to the Employer. A copy of that document dated March 22, 1977, was introduced into evidence as Joint Exhibit 11. In pertinent part, it stated:

We received the altered Letters of Assent B back yesterday, and I do not mind telling you I was very upset that you would alter these documents after I had signed them. Needless to say, they are unacceptable to us with your typed in exclusions for your Company.

I have enclosed additional sets of the Letters of Assent B for your signature, "without altering them". We cannot allow Employers to write in exclusions for themselves for items that they do not happen to be in agreement with.

If you will not sign these Letters of Assent, without altering them, this leaves your Company without I.B.E.W. Line Agreements in Colorado, and I would suggest that you make the necessary arrangements to commence negotiations with the four Local Unions in Colorado in an effort to consummate an agreement that is *mutually* compatible.

Thereafter, there followed an exchange of correspondence between the Employer and the Union in which both parties set forth their respective positions. In this connection, see the Employer's letter dated March 28, 1977, which was introduced into evidence as Joint Exhibit 12; the Union's letter dated April 4, 1977, which was introduced into evidence as Joint Exhibit 13; the Employer's letter dated April 27, 1977, which was introduced into evidence as Joint exhibit 14; the Union's letter dated May 6, 1977, which was introduced into evidence as Joint Exhibit 15, and the Employer's letter dated May 13, 1977, which was introduced into evidence as joint Exhibit 16.

10. The Conversation Between Schwartzkopf and Golf

As a result of the exchange of letters between the Employer and the Respondent, Roland Golf, an International Representative of IBEW, contacted Schwartzkopf at his office in Lincoln, Nebraska, and suggested that the two persons meet to resolve the matter.

The next day Schwartzkopf and Golf met. Schwartzkopf told Golf that the Employer had no argument or disagreement with the Respondent or with any of its employees. He said that the Employer's only objection was to anything relating to the National Electrical Industry Fund. Schwartzkopf said that the Employer had no desire to pay into that fund, and the Employer felt that it was signatory to an agreement which did not contain provisions for the fund. He further stated that the Employer did not want to execute a modified Letter of Assent which would, in effect, bind the Employer to pay into the industry fund. Schwartzkopf stated at the trial that Golf was sympathetic, but that Golf wanted an unmodified Letter of Assent.

11. The Conversations Involving Grinstead, Frame and Schwartzkopf

Grinstead offered to enter into a separate contract with the Employer on several occasions. He stated that he had invited David Frame, the Employer's Northwest Area Manager, to sit down with him and try to arrive at an agreement. Regarding the National Electrical Industry Fund, Grinstead told Frame, ". . . I didn't particularly care if they paid them or didn't pay them, I wasn't concerned about this."

Grinstead stated at the trial that he had made every effort to point out to Frame that the National Electrical Industry Fund was not a condition of bargaining.

Schwartzkopf acknowledged during his cross-examination by the attorney for the Respondent that Grinstead had requested that Schwartzkopf come to Colorado and sit down and bargain with him. He also acknowledged that Grinstead had submitted a proposed contract to the Employer without the requirement of contributions to the National Electrical Industry Fund. The following took place during Schwartzkopf's testimony at transcript page 39:

Q. Did Mr. Grinstead ever request you to come to Colorado and sit down and to bargain with him?

A. He made statements, some to that and some in his correspondence, yes.

Q. Did Mr. Grinstead send you a proposed contract?

A. Yes, he did.

Q. Did that proposed contract have any requirements that dues be paid by you to the National Electrical Industry Fund?

A. No, it did not.

Q. Isn't it a fact that Mr. Grinstead advised you that he would execute and requested you to negotiate a separate agreement and there would be no requirement that you pay into the National Electrical Industry Fund?

A. He did, and in response to that we forwarded him a draft agreement.

12. The Exchange of Contract Proposals

By letter dated July 26, 1977, Grinstead submitted a proposed contract to the Employer. A copy of that letter was introduced into evidence as Joint Exhibit 27. The parties stipulated that Joint Exhibit 36 is the contract proposal referred to in Joint Exhibit 27. In pertinent part, the letter stated:

Enclosed are seven (7) copies of an agreement between Commonwealth Electric and the four I.B.E.W. Line Locals in Colorado.

Please disregard the Letter of Assent A that we mailed you last week.

You will note that the same provisions that were offered in the Letter of Assent A, "No Industry Fund, and a separate wage schedule," are in this agreement, and all references to N.E.C.A. are deleted except the Standard Language in the N.E.B.F. section and the Apprenticeship section. You will also note in Article 1, Sec. 1.1 the agreement is dated July 1, 1977 through June 30, 1978 and continues in effect from year to year thereafter.

We were advised this would be the proper way to consummate an agreement with you, rather than write exclusions on the Letter of Assent A, which incidently

would again assign your Bargaining Rights to N.E.C.A. and I am assuming that you would object to this.

If you have any questions regarding the agreement please contact me.

Please return six (6) executed copies to this office, after these agreements are signed and approved I will forward you an approved copy.

When he was questioned at the trial as to whether the National Electrical Industry Fund was a condition for entering into any collective-bargaining agreement with the Employer, Grinstead answered, "Obviously not. I offered them a contract without the industry fund in it."

By letter dated August 1, 1977, Schwartzkopf submitted the Employer's contract proposal to the Respondent. A copy of the letter of transmittal of that proposal was introduced into evidence as Joint Exhibit 29. In pertinent part, the letter stated:

Pursuant to your request that we negotiate a new contract rather than sign a Letter of Assent B to the existing contract, we enclose herewith our proposed agreement. We have previously offered, and in fact have tendered to you executed Letter of Assent B's assenting to all portions of the agreement that concern men, Local Union 12 and the International Union. The only part of the agreement we have ever taken issue with is the Industry Fund, a fund that is paid exclusively to and for the benefit of the National Electrical Contractors Association. You have refused these Letters of Assent and have requested that we negotiate a new contract. The attached document is submitted pursuant to this request.

The Employer's proposal enclosed with Joint Exhibit 29 was found to be unacceptable to the Respondent. At the trial, Grinstead gave several examples of matters, which in his opinion made the proposal unacceptable. They were: the absence of a union shop clause; the alteration in the scope of the work; the 2-year duration of the agreement, instead of 1 year; no change in the wage rates; no approval of the agreement by the International office of the IBEW; the absence of binding arbitration procedures; a "most favored nation" clause; the transfer of

employees clause; the deletion of an age discrimination clause; a change in the safety clause, and the elimination of time for the conducting of business by union stewards.

The foregoing, of course, represents the views stated on the record by Grinstead, and what he perceived to be the differences between the Respondent's contract proposal and the Employer's contract proposal. In this connection, see Joint Exhibit 30, which is a copy of a letter dated August 5, 1977, from Grinstead to Schwartzkopf in which Grinstead outlines his objections to the Employer's proposed contract. In response to Joint Exhibit 30, Schwartzkopf wrote to Grinstead on August 19, 1977. See Joint Exhibit 31 for the contents of that document. Additional correspondence between Schwartzkopf and Grinstead are shown in Joint Exhibit 34 which is a letter dated September 21, 1977, by Grinstead; and Joint Exhibit 35 which is a letter dated September 27, 1977, by Schwartzkopf.

13. The Events in July and August 1977 Regarding the Bayfield Pagosa Project

On July 18, 1977, work resumed on the Bayfield Pagosa Project. As indicated earlier, the jobsite for that project was within the geographical jurisdiction of the Respondent.

The parties stipulated that in July 1977 there was a request by the Employer for a referral of persons to the jobsite. The parties further stipulated that the request was refused by the Respondent, and that no one was referred to work for the Employer on that jobsite on or after July 1977.

The parties also stipulated that the Respondent engaged in a strike against the employer, and that the Respondent engaged in picketing of the jobsite from August 11, 1977, to August 19, 1977. The Respondent's picket signs read, "Commonwealth Electric has no agreement with IBEW Local No. 12, 111, 113 and 969." (See Joint Exhibit 45).

Work at the Bayfield Pagosa Project ended in October 1977. The Employer moved its equipment off of the project and completed miscellaneous tasks in November 1977.

14. The Meeting Between Schwartzkopf and Farnan on September 8, 1977

At the request of Farnan, there was a meeting between Schwartzkopf and Farnan on September 8, 1977, in the Employer's office located in Lincoln, Nebraska.

Farnan told Schwartzkopf that he wanted to discuss the difficulties which had arisen between the Employer and the Respondent. Farnan also testified "... I told him, based on our many years of honorable and compatible association, especially with Mr. Schorr's father, that I did give him my personal word that were he to sign an unaltered Letter of Assent, that is, Assent A, the IBEW would not pursue the collection of the industry fund."

Schwartzkopf asked Farnan to put that assurance in writing, but Farnan said that he could not do so. Farnan said that Schwartzkopf would have to take Farnan's word for it.

Schwartzkopf told Farnan that the industry fund was a nonmandatory subject of bargaining. Farnan pointed out that the Employer had already accepted unaltered Letters of Assent in the several states surrounding the Employer's headquarters. However, Schwartzkopf only offered to sign an altered Letter of Assent at that time with the Respondent.

15. The Fines Levied by the Respondent

It was admitted in the pleadings that the employees named in paragraph X of the General Counsel's complaint had worked behind the picket lines established by the Respondent previously referred to. One of those persons named in paragraph X is the Charging Party in this proceeding.

The parties stipulated that letters similar to Joint Exhibit 43 were sent to the other persons who are named in paragraph X of the General Counsel's complaint. Joint Exhibit 43 is a letter dated March 6, 1978, from the secretary of the Trial Board of the Respondent to the Charging Party, and that document advises him of certain fines which were levied against him. (In

this connection, see Joint Exhibit 44, which is a copy of the IBEW Constitution and Rules for Local Unions). The Respondent admitted that the fines were assessed.

16. Conclusions

In its decision in *Taft Broadcasting Co.*, WDAF AM-FM TV, 163 NLRB 475, at page 478 (1967), the Board has described a bargaining impasse as follows:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good-faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Based upon the findings of fact as set forth in Section 5 herein, I conclude that no contract has existed between the Employer and the Respondent at least after October 31, 1976. It was established by both the Employer's representative and the Respondent's representative that searches of their respective files disclosed no document which would bind those parties in a collective-bargaining agreement.

Based upon the credited testimony and the documentary evidence referred to previously herein, I conclude that the Respondent's representative expressed a willingness to the Employer's representatives to meet and bargain with the Employer for a separate contract without the requirement of making contributions to the National Electrical Industry Fund. In this regard, note the conversations referred to in Section 11 herein.

I also conclude that the Respondent proposed a contract to the Employer, which did not require the Employer to make contributions to the National Electrical Industry Fund, as distinguished from employee benefit funds. See Section 12 herein, especially Joint Exhibit 27 and Joint Exhibit 36. As Grinstead testified, "I offered them a contract without the

Industry Fund in it." Nevertheless, the Employer did not find the Respondent's proposal acceptable, nor did the Respondent find the Employer's counterproposal acceptable. Significantly, the reasons advanced by the Respondent for rejecting the Employer's counterproposal did not involve the absence from that proposal of a clause requiring contributions to the National Electrical Industry Fund. Thus, the conversation between Schwartzkopf and Farnan on September 8, 1977, has to be considered in the context of the prior contract proposals and discussions among the parties. Considering that conversation in context with those prior events, I conclude that Farnan's actions on that date cannot fairly be characterized as an insistence to impasse on including contributions to the National Electrical Industry Fund. See *Taft Broadcasting, supra*.

Since I have concluded that the Respondent did not insist to impasse on a nonmandatory subject of bargaining, I further conclude that the Respondent's levying of fines against those persons named in paragraph X of the General Counsel's complaint did not violate Section 8(b)(1)(A) of the Act under the theory advanced by the General Counsel. Accordingly, I must recommend to the Board that the General Counsel's complaint be dismissed.

Conclusions of Law

1. The Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has not engaged in the unfair labor practices, which were alleged in the General Counsel's complaint in this proceeding, for the reasons which have been set forth above.

ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to the provisions of Section 10(c) of the Act, I hereby issue the recommended Order set forth below.

IT IS HEREBY ORDERED that the complaint in this proceeding be dismissed in its entirety.

In the event that no exceptions are filed, as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, recommended Order herein shall, as provided by Section 102.48 of the Board's Rules and Regulations, be adopted by the Board and shall become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

Dated: APR 2 1980

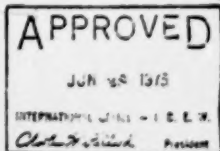
/s/ Roger B. Holmes
ROGER B. HOLMES
Administrative Law Judge

LETTER OF ASSENT—A

In signing this letter of assent, the undersigned firm does hereby authorize _____ Chapter, NECA.

_____ as its collective bargaining representative for all matters contained in or pertaining to the current approved _____ Inside labor agreement between the _____ Chapter, NECA

and Local Union _____ IBEW. This authorization, in compliance with the current approved labor agreement, shall become effective on the _____ 1st day of _____ January 1973. It shall remain in effect until terminated by the undersigned employer giving written notice to the _____ Chapter, NECA _____ and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the aforementioned approved labor agreement.



SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

NAME OF FIRM

(print or type)

SIGNED FOR THE EMPLOYER

BY _____
(original signature)

TITLE _____ EXECUTIVE VICE PRESIDENT

DATE _____

SIGNED FOR LOCAL UNION _____ IBEW

BY _____
(original signature)
Jack P. Anderson

TITLE _____ Business Manager

DATE _____

INSTRUCTIONS

1. NAME OF CHAPTER OR ASSOCIATION

Insert full name of NECA Chapter or Contractors Association involved.

2. TYPE OF AGREEMENT

Insert type of agreement. Example: Inside, Outside Utility, Outside Commercial, Outside Telephone, Residential, Motor Shop, Sign, Tree Trimming, etc. The Local Union must obtain a separate assent to each agreement the employer is assenting to.

3. LOCAL UNION

Insert Local Union Number.

A MINIMUM OF FOUR COPIES OF THE JOINTLY SIGNED ASSENTS MUST BE SENT TO THE INTERNATIONAL OFFICE FOR PROCESSING. IMPORTANT: These forms are printed on special paper and on carbon paper to expedite the duplicate copies. Remove from the past enough copies of the form for a complete set and complete the form; the copies will separate in accordance with design. CAUTION: do not enter on printed lines; insert forms before will be applied.

IBEW FORM 508

4. EFFECTIVE DATE

Insert date that the assent for this employer becomes effective. Do not use agreement date unless that is to be the effective date of this Assent.

5. EMPLOYER'S NAME

Print or type Company name.

6. SIGNATURES

International Office copy must contain actual signatures—not reproduced—of a Company representative as well as a Local Union officer.

LETTER OF ASSENT—B

This is to certify that the undersigned employer has examined a copy of the current approved

Inside

labor agreement between INTERNATIONAL CITY OF N.E.C.A.

and Local Union 354, IBEW.

The undersigned employer hereby agrees to comply with all of the terms and conditions of employment contained in the above mentioned agreement and all approved amendments thereto. It is understood that the signing of this letter of assent shall be as binding on the undersigned employer as though he had signed the above referred to agreement, including any approved amendments thereto.

This letter of assent shall become effective for the undersigned employer on the 3rd day of JANUARY 1970 and shall remain in effect until the 31st day of DECEMBER 1978 (termination date)

If the undersigned employer does NOT intend to renew this assent, he shall so notify the Local Union in writing at least sixty (60) days prior to the termination date.

SUBJECT TO THE APPROVAL OF THE INTERNATIONAL PRESIDENT, IBEW

NAME OF FIRM

INTERNATIONAL CITY OF N.E.C.A.

(type or print)

SIGNED FOR THE EMPLOYER

BY

Thomas E. Carey
(typed signature)
Vice President

TITLE

DATE JANUARY 3, 1970

SIGNED FOR LOCAL UNION 354, IBEW

BY

Jack P. Anderson
(typed signature)
Business Manager

TITLE

DATE JANUARY 3, 1970

INSTRUCTIONS

• TYPE OF AGREEMENT

Insert type of agreement. Examples: Inside, Outside Utility, Outside Commercial, Outside Telephone, Residential, Motor Shop, Sign, Tree Trimming, etc. The Local Union must obtain a separate assent to each agreement the employer is assenting to.

• NAME OF CHAPTER OR ASSOCIATION

Insert full name of NECA Chapter or Contractors Association involved.

• LOCAL UNION

Insert Local Union Number.

• EFFECTIVE DATE

Insert date that the assent for this employer becomes effective.

Do not use agreement date unless that is to be the effective date of this Assent.

• TERMINATION DATE

This date cannot exceed the anniversary date of the current approved agreement but can be for a lesser period of time.

• EMPLOYER'S NAME

Print or type Company name.

• SIGNATURES

International Office copy must contain actual signatures—not reproduction—of a Company representative as well as a Local Union officer.

A MINIMUM OF FOUR COPIES OF THE JOINTLY SIGNED AGREEMENTS MUST BE SENT TO THE INTERNATIONAL OFFICE FOR PROCESSING. REPORTARY: These forms are printed on special paper and no carbon paper is required for duplicate copies. Remove from the pad enough copies of the form for a signature set and maintain the balance the length the length of the agreement. CAUTION: Do not write on printed forms; removal forms below will be voided.

171a

STOKES, SHAPIRO, FUSSELL & GENBERG
ATTORNEYS AT LAW
2300 FIRST ATLANTA TOWER
ATLANTA, GEORGIA 30383

404/658-9050
TELEX 80-4026
NEWSLETTER
JUNE - 1982

INDUSTRY FUND DECLARED AN ILLEGAL PRICE FIXING SCHEME

In a landmark decision the United States Court of Appeals for the Fourth Circuit affirmed a federal district court ruling which declared that a national agreement between the National Electrical Contractors Association (NECA) and the International Brotherhood of Electrical Workers (IBEW) constituted a *per se* illegal price fixing agreement under the Sherman Antitrust Act.

The agreement between NECA and IBEW required all electrical contractors using IBEW labor to pay 1% of their electrical labor payroll to an industry fund established by NECA, regardless of whether they were members of NECA. Ira Genberg of Stokes, Shapiro, Fussell & Genberg filed suit on behalf of fifteen (15) construction companies and the National Contractors Association (NCA) against officials of NECA

L... ..

and IBEW alleging that the agreement violated the Sherman Antitrust Act. After two years of discovery, both the plaintiffs and the defendants filed motions for summary judgment and the plaintiffs moved for certification of the action as a class action. The federal district court certified the case as a class action, granted the plaintiff's motion for summary judgment and dismissed the defendant's counterclaims. The court found:

" . . . The undisputed facts . . . establish that NECA and the IBEW entered into a written agreement to add a surcharge, determined by a uniform formula, to the cost of procuring *all* contracts with the IBEW in the electrical construction industry. The facts also establish that the purpose of the agreement was to eliminate competition between NECA members and non-NECA members in bidding for projects in the industry. In the Court's view, those facts are sufficient to establish a price-fixing scheme which is *per se* illegal . . ." (Emphasis in original)

The court also determined that the NECA-IBEW agreement was not exempt from the antitrust laws under the usual exemption for the activities of labor organizations. The court found that the IBEW's agreement to obtain the National Electrical Industry Fund contributions from non-members of NECA "at the behest of and in combination with NECA" was not protected by the national labor policy and therefore was not exempt from the Sherman Act. The court noted that the labor exemption did not apply if the union combined with a non-labor group to promote the non-labor group's interests, particularly where the union joins what is in essence a business group's scheme to control the marketing of goods or services.

A three judge panel of the federal appeals court upheld the lower court ruling. "There can be no doubt that the agreement in question here . . . falls within the definition of price fixing," the court said. "The industry fund would tend to stabilize the price of electrical construction contracts, a practice illegal *per se* under the Sherman Act." This latest decision has the potential of the imposition of staggering monetary damages. Damages incurred by the plaintiffs are anticipated to exceed \$120 million.

AGREEMENT

This agreement is by and between the International Brotherhood of Electrical Workers, AFL-CIO, and the National Electrical Contractors Association, Inc.

The appropriate contents of this agreement and the enabling clauses herein shall be inserted in all agreements between the parties and in all construction agreements between the Local Unions of the IBEW and the Local Chapters of NECA.

This agreement shall remain in effect until such time as it is changed or terminated as provided herein.

This agreement may be changed by mutual consent of the parties (IBEW-NECA) at any time. Such changes shall be reduced to writing and incorporated into the agreement.

This agreement may be terminated by either party (IBEW-NECA) upon written notice to the other of at least 180 calendar days. Termination shall mean the termination of all aspects of this agreement and shall relieve the parties of any obligation which the parties have pledged herein.

ARTICLE ONE — NEBF

The parties hereby agree to increase by two percent (2%) the employer contribution to the National Electrical Benefit Fund effective July 1, 1977.

The current NEBF language contained in working agreements shall be changed from a one percent (1%) contribution to a three percent (3%) contribution.

ARTICLE TWO — INCREMENT PENSION PLAN

The parties hereby agree to sign and implement the National Electrical Contractors Association Retirement Plan adopted by the NECA Board of Governors in New York, New York, on October 11, 1975. A copy of this plan is attached and made a part of this agreement. The language contained in this plan

shall be made to conform with federal laws governing plans of this type.

ARTICLE THREE — SHIFT WORK

The following shift clause language shall be inserted in all working agreements between the local chapter and IBEW local unions.

"When so elected by the contractor, multiple shifts of at least five (5) days duration may be worked. When two (2) or three (3) shifts are worked: "The first shift (day shift) shall be worked between the hours of 8:00 A.M. and 4:30 P.M. Workmen on the day shift shall receive eight (8) hours pay at the regular hourly rate for eight (8) hours work.

"The second shift (swing shift) shall be worked between the hours of 4:30 P.M. and 12:30 A.M. Workmen on the "swing shift" shall receive eight hours pay at the regular hourly rate plus 10% for seven and one-half (7½) hours work.

"The third shift (graveyard shift) shall be worked between the hours of 12:30 A.M. and 8:00 A.M. Workmen on the "graveyard shift" shall receive eight (8) hours pay at the regular hourly rate plus 15% for seven (7) hours work.

"A lunch period of thirty (30) minutes shall be allowed on each shift.

"All overtime work required after the completion of a regular shift shall be paid at one and one-half times the "shift" hourly rate.

"There shall be no pyramiding of overtime rates and double the straight time rate shall be the maximum compensation for any hour worked.

"There shall be no requirement for a day shift when either the second or third shift is worked."

ARTICLE FOUR — MANAGERMENTS RIGHTS

The following managements rights clause shall be inserted in all working agreements between the local chapters and the IBEW Local Unions.

"The Union understands the employer is responsible to perform the work required by the owner. The employer shall therefor have no restrictions, except those specifically provided for in the collective bargaining agreement in planning, directing, and controlling the operation of all his work, in hiring and laying off employees, in transferring employees from job to job within the local union's geographical jurisdiction, in determining the need and number as well as the person who will act as foreman, in requiring all employees to observe the employer's and/or owner's rules and regulations not inconsistent with this agreement, in requiring all employees to observe all safety regulations, and in discharging employees for proper cause."

ARTICLE FIVE — APPRENTICE RATIOS

The apprentice to journeyman ratio in all agreements between the local chapters and the IBEW local unions shall be set at one (1) apprentice to three (3) journeymen or fraction thereof.

This ratio is to be interpreted to allow the following apprenticeship to journeymen relation on any job or in any shop.

1 Apprentice to 1 Journeyman

1 Apprentice to 2 Journeymen

1 Apprentice to 3 Journeymen

2 Apprentices to 4 Journeymen

2 Apprentices to 5 Journeymen

2 Apprentices to 6 Journeymen

3 Apprentices to 7 Journeymen

Etc.

A program shall be instituted to assure the effectiveness of these ratios on a local level.

ARTICLE SIX — INDUSTRY FUND

The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.

All construction agreements in the electrical industry shall contain the following language:

"Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do so will be considered breach of this agreement on the part of the individual employer." *(an amount not to exceed 1% nor less than 0.2 of 1%, as determined by each local chapter and approved by the trustees)

The National Electrical Contractors Association will be responsible to see that the objects of the fund, as outlined in the trust, are adhered to strictly.

No part of the funds collected under this trust shall be used for purely social activities.

No part of the funds collected under this trust shall be used for any purpose which is held to be in conflict with the interests of the International Brotherhood of Electrical Workers and its local unions.

Both parties will be provided with a copy of the Trust and any future amendments.

This agreement shall become effective June 1, 1977.

Signed for NECA

/s/ Robert L. Higgins
ROBERT L. HIGGINS
Executive Vice
President, NECA

December 8, 1976

/s/ Charles H. Pillard
CHARLES H. PILLARD
International President,
IBEW

December 8, 1976

**DECLARATION OF TRUST
NATIONAL ELECTRICAL INDUSTRY FUND**

This Declaration of Trust is made by the National Electrical Contractors Association, Inc., and the Trustees of the National Electrical Industry Fund, who shall be appointed by the NECA Executive Committee, and are hereinafter referred to as the Trustees.

The Trustees are hereby designated as the persons to receive the contributions made by individual employers to the National Electrical Industry Fund. The Trustees or their designated agents agree to receive all such contributions, deposits, monies or other assets and to hold the same in trust for the uses and purposes of the Trust herein created.

The Trustees or their designated agents shall be responsible for the division and transmittal of all contributions received from individual employers. Immediately upon receipt of a contribution, the collection agent (local NECA Chapter) shall forward an amount equal to .2 of 1% of the productive labor payroll, less any exclusions set forth in the National Agreement, to the National Electrical Industry Fund, 7315 Wisconsin Avenue, Washington, D.C. 20014, and the remainder to the local NECA Chapter in whose jurisdiction and under whose labor agreement the work was performed.

The NECA chapter shall be held responsible to carry out the purposes of the Trust on the local level. The National Electrical Contractors Association, Inc., shall have overall responsibility to see that the objects of the fund are adhered to strictly as well as responsibility for carrying out the purposes of the Trust at the national and regional level.

The National Electrical Contractors Association, Inc. shall be responsible for payment of incidental cost in the operation of the National Electrical Industry Fund at the national level out of its portion of the Fund. All costs of operating the Fund on the chapter level will be borne by the local NECA chapters.

The purposes of this Trust are limited solely to the following activities:

1. To engage in advertising, publicity and promotional activities which will advise the public at large of the nature, extent and availability of the services performed by the electrical contracting industry.

2. To engage in educational research and experimentation programs directed at the formulation of uniform electrical specifications and high quality of electrical construction.

3. To engage in programs and activities directed at assisting architects, engineers, specification writers, general contractors and governmental authorities in the formulation or improvement of governmental codes and other technical and safety programs.

4. To engage in programs to acquaint employees with the purpose and use of new products as they are available.

5. To provide training for journeymen, management and sales personnel employed in the electrical contracting industry.

6. To engage in programs and activities directed toward acquainting employees with governmental safety regulations and industry policy as well as training for such employees in first aid and other safety programs and methods.

7. To engage in market surveys concerning employment and business opportunities and the collection of other needed statistical information concerning the industry.

8. To engage in programs and activities directed at promoting sound labor relations in the industry.

9. To pay the employers' cost of collective bargaining.

10. To pay the employer representatives expenses and the Association's costs in the operation of the Council on Industrial Relations for the Electrical Contracting Industry.

11. To pay the Association's costs and expenses in support of the operations of the National Joint Apprenticeship and Training Committee.

12. To pay all operating costs and the expenses incurred by the Association in the administration and carrying out of the purposes as well as the compensation for personnel of the Association engaged in programs and activities outlined herein.

No portion of the monies collected under this Trust shall be used for purely social activities.

No part of the funds shall be used for any purpose which is held to be in conflict with the interests of the International Brotherhood of Electrical Workers.

Should any provision of the Declaration of Trust be held to be unlawful, such fact shall not adversely affect the other provisions contained herein or the application of said provisions to any other person or instances unless such illegality shall make impossible the functioning of the Trust. No Trustee shall be held liable for any act done or performed in pursuance of any provisions hereof prior to the time such act or provision shall be held unlawful by a court of competent jurisdiction.

In witness whereof, the undersigned Trustees hereby consent to and accept the terms and conditions of the Trust and promise to perform the duties and obligations imposed hereby.

181a

(Signatures of Trustees)

[All Eleven (11) Signatures Illegible]

/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	/s/ _____
/s/ _____	

Approved by
National Electrical
Contractors Association, Inc.

September 24, 1977

/s/ Robert L. Higgins
ROBERT L. HIGGINS
Administrative Agent

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. HM-77-1302

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Plaintiffs

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, *et al.*,
Defendants

DEFENDANTS' PROFFER OF TESTIMONY

Since the briefing and arguing of the summary judgment motions, defendants have been permitted to obtain significant additional deposition discovery. Because that discovery was unavailable to them at the time of argument, defendants jointly now make this additional proffer concerning issues material to this case.

In instances in which defendants have received copies of the transcripts of recent depositions, they have included page citations. They still await the transcripts containing much of the proffered material.

Introduction.

Plaintiffs have failed to establish that they have encountered any non-NECA collective bargaining agreements which include the NEIF. Their labor representatives have conceded that the only agreements known by them to include the NEIF are NECA-IBEW collective bargaining agreements. Recent testimony also confirms that it is not the policy of the IBEW to require the inclusion of the NEIF in non-NECA electrical construction agreements.

Foley representatives have recently identified additional areas where they have long been successful in securing IBEW union electricians without any written labor contract at all, and without being requested to agree to pay into the NEIF. They have also revealed that Foley is assented to at least two non-NECA collective bargaining agreements, neither of which contains the NEIF.

Plaintiffs' witnesses have also revealed the existence of between one hundred and two hundred independent agreements signed by the building trades unions whose services are required to complete a particular project, which normally exclude all industry fund payments. Project agreements were negotiated both before and after the signing of the NECA-IBEW National Agreement, and, according to plaintiffs, their use "is an increasing thing".

I. The National Electrical Industry Fund Provision Was Never Intended To Be Included In Non-NECA Collective Bargaining Agreements.

1. Gary Murchison, the chief labor relations executive of plaintiff C. F. Braun Constructors, and Chairman of NCA's Labor Relations Committee in 1977 and 1978, was deposed on March 13, 1980. He testified that he was unaware of the existence of any agreement, other than NECA-IBEW agreements, which included the NEIF provision.
2. Eugene J. O'Neill, plaintiff Guy F. Atkinson's principal labor relations representative since 1951, was deposed on March 12, 1980. He testified that he was unaware of a single agreement, other than NECA-IBEW agreements, which included the NEIF.
3. On February 27 and 28, 1980, plaintiffs deposed William F. Ferry, Director of the IBEW's Agreement Approval Department, who directly contradicted plaintiffs' claim that the National Agreement contemplates inclusion of the NEIF in all IBEW labor agreements. Mr. Ferry made it clear that no such requirement has ever, in fact, been imposed by the IBEW, but

rather, it has consistently been the position of the IBEW that the only agreements required to contain NEIF provisions are NECA chapter agreements. He noted that non-NECA agreements which omitted NEIF provision have been consistently approved by the IBEW since the time of the initial receipt of such agreements in approximately March of 1977 (111-114), subsequent to the NECA-IBEW National Agreement and prior to the protest concerning the NEIF and threat of litigation from the National Constructors Association sent to IBEW President Pillard on April 28, 1977.

4. Robert W. Patricoski, a former vice president and paid consultant of the Howard P. Foley Company, and Frederick S. Cates, a current vice president of that company, were deposed respectively on January 31 and January 17, 1980. Both testified that in various regions of the country that company had been or was being supplied labor by IBEW local unions without the necessity of the company working under any written labor agreement at all, much less working under a written agreement requiring payments into the National Electrical Industry Fund. In those jurisdictions, the company paid its electricians the wages and fringe benefits that had been established in the local NECA agreement with the exception of the NEIF. No requests had been made of the company to agree to pay into the NEIF. Local unions with which Foley established such informal agreements, most of which continue to the present, include local 242, Duluth, Minnesota (Patricoski, 138), Local 915 in Tampa, Florida (Cates, 256-7), Local 308 in St. Petersburg, Florida (Cates, 257-259), Local 108 in Tampa, Florida (Cates, 304).

5. Milton Abazzia, vice president of the Howard P. Foley Company, was deposed on February 14 and 15, 1980. In the course of his testimony, he identified two labor agreements that he was aware of between IBEW locals and non-NECA trade associations which do not contain provision for payment into the NEIF. The first was negotiated by the Ventura County Electrical Contractors Association with IBEW Local No. 952 in Ventura, California; the second by the Kern County

Electrical Contractors Association with IBEW Local No. 428 in Bakersfield, California. The Howard P. Foley Company has obtained letters of assent to both agreements from the local IBEW unions which negotiated them and is accordingly not obligated to make payments into the NEIF on work in those jurisdictions. Indeed, in the case of Local No. 428, the local business manager, James Deevers, specifically invited the Howard P. Foley Company to assent to the Ventura County Contractors agreement rather than the local NECA chapter agreement because the local union was about to strike contractors signatory to the NECA agreement.

6. NCA President Maurice Mosier was deposed on February 21 and 22, 1980. He testified that since at least as early as 1978, NCA has worked to develop project agreements between NCA member companies and the building trades which free NCA members from all obligation to pay into industry funds. Mosier is aware of the existence of more than one hundred, and perhaps two hundred, such project agreements. The use of project agreements "is an increasing thing," and many constructors would not attempt a large project without one (786-94, 800-01 and 807). Gary Murchison also confirmed that there exist between one hundred and two hundred project agreements, which normally exclude all industry fund obligations.

7. John T. Woods, Jr., Manager of Labor Relations and designee witness of plaintiff Arthur G. McKee & Company, was deposed on January 9 and 10, 1980. He testified that McKee negotiated project agreements excluding industry fund obligations with local building trade councils, which include IBEW local unions from 1972 through 1978. Typically, McKee would prepare the first draft of the project agreement, including an industry fund exclusion provision, and then submit it to the local building trades council. He could recall no instance in which the industry fund exclusion provision was rejected by the building trades. McKee will attempt to obtain project agreements in the future, if it determines that doing so is in its best interest. He is also aware that other NCA members work under project agreements which exclude industry fund payments (276-77, 296-99 and 302).

8. Paul M. Weberling, former Vice President and Director of Construction for plaintiff Pullman-Kellogg, and employed by it as a consultant at the time of his deposition on December 5-6, 1979, testified as Pullman-Kellogg's designee. Pullman-Kellogg obtained project agreements excluding all industry fund payments from IBEW locals and the other building trades both before and after the execution of the NECA-IBEW National Agreement. Pullman-Kellogg continues to operate under those project agreements today, and direct hires electricians without protest, and without paying into the National Electrical Industry Fund. Mr. Weberling could not recall any instance between 1976 and his retirement in August, 1978 in which Pullman-Kellogg sought, but was refused, a project agreement (47-48 and 61-62). Edwin F. Ryan, Pullman-Kellogg's Director of Labor Relations for the past eleven years, was deposed on March 5, 1980. He also confirmed Pullman-Kellogg's practice of seeking project agreements which contain industry fund exclusion provisions. He was unable to recall any instance in which Pullman-Kellogg was refused a project agreement, or was unable to obtain a project agreement which excluded all industry fund obligations. He also testified that Pullman-Kellogg will seek additional project agreements in the future, if that is determined to be in the company's best interests.

9. Donald Provost, President and Chairman of the Board of plaintiff Stearns-Roger, Inc., testified on March 7, 1980, that his company has operated under approximately twenty project agreements during the last decade. Although he could not recall whether those project agreements specifically excluded industry fund obligations, two of the four agreements produced to defendants did, in fact, contain such exclusions. Kenneth Molleur, Vice President of Labor Relations for Stearns-Roger, Inc., testified on January 23, 1980 that on the only occasion, subsequent to implementation of the NECA-IBEW National Agreement, that his company has attempted to negotiate a project agreement excluding requirements for industry fund payments, the local IBEW union accepted the exclusion and has been working under the agreement without incident ever since (214-216).

10. William F. Ferry, Director of the IBEW's Agreement Approval Department, testified that while the International Office of the IBEW does not approve project agreements that exclude all obligations to pay into industry funds, it has not prohibited IBEW local unions from entering into such agreements, has taken no sanctions against unions that have entered into such agreements, and recognizes the enforceability of such agreements once executed by local IBEW unions (42-50).

II. No Showing Of Injury Or Threatened Injury Has Been Made.

Introduction.

Additional testimony, also unavailable at the time of showing of injury or threatened injury, elements of any private antitrust action.

1. J. W. Kelly, Vice President and designee of plaintiff Badger America, Inc., was deposed on February 27 and 28, 1980. He and the company's corporate counsel, Alfred W. Glauner, Esquire, who was also present, admitted that their company has not direct hired electricians or subcontracted electrical construction work since July 1, 1977, the date that the National Electrical Industry Fund went into effect (193-95). It was therefore conceded that Badger America's assertion in its answers to NECA's interrogatories "that payments made to subcontractors or members of NECA have included amounts to be paid by the subcontractors to the National Electrical Industry Fund" was untrue (196-203). He could not identify any project on which Badger America intended, in the future, to direct hire electricians or to subcontract electrical construction work.

2. Donald Provost, President and Chairman of the Board, of Stearns-Roger, Inc., testified that his company had not suffered any damage resulting from the National Electrical Industry Fund.

3. E. F. Ryan testified that Pullman-Kellogg's project managers have been instructed to refuse reimbursement of

National Electrical Industry Fund payments on all Pullman-Kellogg jobs on which electrical construction work was subcontracted. He believed that those instructions had been carried out, and was unaware of any instance in which Pullman-Kellogg had reimbursed an electrical subcontractor for NEIF payments. On direct hire work, Pullman Kellogg has consistently taken the position that its IBEW international agreement does not contractually obligate it to pay into the National Electrical Industry Fund. It has therefore refused all payment without encountering any strike, showdown, or refusal by the IBEW to supply it electricians.

4. John Woods testified that plaintiff McKee has never utilized its international agreement to direct hire electricians, and has no present intention to do so (67).

5. R. H. MacDougall, Manager, Subcontracts, for plaintiff Arthur G. McKee testified on March 11, 1980 that he was unaware of any instance in which Arthur G. McKee has reimbursed any electrical subcontractor for NEIF payments. He testified that on cost reimbursable electrical subcontracts, McKee insists that its electrical subcontractors not seek reimbursement of National Electrical Industry Fund payments. Thus, on one recent project, McKee successfully compelled its electrical subcontract bidders to delete all requests for NEIF reimbursement, amounting to one-half of one percent of electrical payroll, but specifically approved reimbursement of local NECA service charges amounting to a full one percent of the electrical payroll. McKee passed that cost on to its customer.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. HM-77-1302

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Plaintiffs

v.

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., *et al.*,
Defendants

DEFENDANTS' SUPPLEMENTAL PROFFER OF
TESTIMONY

Since the submission of their proffer on March 19, 1980, defendants have completed their deposition discovery. Each of the five depositions referred to in this Supplemental Proffer was originally noticed by defendants for a date prior to March 1, 1980, the discovery termination date. They were, however, continued at plaintiffs' request or as a consequence of plaintiffs' motion for protective order, denied by the Court on February 25, 1980. Because this discovery was unavailable to defendants either at the time of argument, or at the time their original proffer was submitted, defendants jointly make this Supplemental Proffer concerning issues material to this case.

Defendants also submit herewith copies of the portions of the deposition transcripts which contain the proffered testimony.

**I. The National Electrical Industry Fund Provision Was
Never Intended To Be Included In Non-NECA Collective
Bargaining Agreements.**

1. The deposition of W. David McIntire, plaintiff Catalytic's designee witness and Manager of Staff Services, and

present Chairman of NCA's Labor Relations Committee, was continued on March 31, 1980. McIntire testified that his company had not encountered any non-NECA collective bargaining agreement which contained the NEIF provision (420-21). He testified further that he knew of no non-NECA agreement which included the NEIF, and that he had never learned that any NCA member had ever suffered injury resulting from the inclusion of the National Electrical Industry Fund provision within a non-NECA collective bargaining agreement (421). He conceded that the possibility that the NEIF provision might be included within non-NECA agreements was not even discussed within Catalytic or within the Labor Relations Committee, and played no role in Catalytic's decision to join as a plaintiff in this suit (424-28).

2. Defendants continued the deposition of John T. Woods, Jr., plaintiff Arthur McKee's designee witness, Manager of Labor Relations and principle labor relations representative, on March 27, 1980. He testified that McKee had never encountered a non-NECA agreement which included the National Electrical Industry Fund provision, and that he was unaware of the existence of any non-NECA collective bargaining agreement in which the industry fund provision had been inserted (505-06).

II. No Showing Of Injury Or Threatened Injury Has Been Made.

1. G. Bretnell Williams, President and a member of the Board of Directors of plaintiff H. K. Ferguson Company, was deposed on March 20, 1980. He testified that at least 97% of H. K. Ferguson's electrical construction work is sub-contracted (35-36). Since Ferguson employs its electrical sub-contractors on a lump sum basis, it does not know whether or not they are paying into the NEIF; and, as Williams testified, "I'm not sure it is any of my business" (47-48). He confirmed that the NEIF has not affected Ferguson's subcontracting operations (58-59).

2. The National Electrical Industry Fund has not affected the small amount of construction on which H. K. Ferguson direct hires electricians, because it has consistently refused to pay into the fund (60). H. K. Ferguson's refusal to pay has not, however, resulted in any competitive advantage known to Mr. Williams. Williams testified that H. K. Ferguson has made no attempt to determine what, if any, competitive impact would result if H. K. Ferguson began to make payments into the National Electrical Industry Fund (92).

3. Robert K. Boyd, Senior Vice President and a Director of plaintiff Guy F. Atkinson Company, was deposed on March 28, 1980. Although his responsibilities as Senior Vice President do not involve construction, he shares overall responsibility for the conduct of all of Guy F. Atkinson's business, including its construction activities (31 and 98). He testified that the Board of Directors has not found it necessary to formulate any policy concerning industry funds, nor has it considered whether industry funds will affect Guy F. Atkinson's competitive position or profitability (32-33). Although any matter which might significantly injure Atkinson's profitability or competitive position must be reported to the Board of Directors, Boyd has received no report that either NECA or the IBEW has done anything to injure or to threaten injury to Guy F. Atkinson (32-33, 37-39, 89-90 and 99).

4. John R. Ghublikian, President and member of the Board of Directors of plaintiff Badger America, Inc., was deposed on March 19, 1980. He confirmed that Badger America has neither subcontracted electrical construction work nor direct hired electricians since July 1, 1977, the date that the NEIF went into effect (14). Nor was Mr. Ghublikian aware that any project awarded Badger would involve direct hiring or subcontracting electrical construction work in the future (18). Ghublikian confirmed the deposition testimony of Badger Vice President J. W. Kelly that if Badger America did subcontract electrical construction work, it would not seek to determine whether the electrical contractor paid into the National Electrical Industry Fund (36-40). Ghublikian testified that the NEIF had no tangi-

ble effect on Badger America's ability to compete within the marketplace (40).

5. Part of W. D. McIntire's responsibility as Manager of Staff Services has been to provide information concerning labor costs for inclusion in bids submitted by Catalytic. In compiling information relating to electrical construction labor costs, McIntire includes wages and fringe benefits, but excludes all reference to the National Electrical Industry Fund. To the best of his knowledge, therefore, the NEIF is not included within Catalytic's bids to its customers (506-009). McIntire knows of no work obtained by Catalytic as a result of excluding the NEIF from its bids (523). McIntire also testified that when Catalytic direct hires electricians, it refuses to pay into the industry fund, without encountering any labor problems (526-27). On projects on which Catalytic subcontracts electrical construction, it advises the subcontractor that he will not be reimbursed for National Electrical Industry Fund payments (487-88). McIntire does not know whether any of Catalytic's electrical subcontractors in fact paid into the NEIF, or whether their obligation to the NEIF was greater or less than any previous obligation to pay NECA service charges (489 and 498-99).

Section 16 of the Clayton Act, 15 U.S.C.
§26 provides in pertinent part:

"Sec. 16. That any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the anti-trust laws, including sections two, three, seven and eight of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue".

Nos. 82-1146; 82-1147

Office - Supreme Court, U.S.

FILED

FEB 25 1983

ROBERT L. STEVAS,
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
(AFL-CIO), and CHARLES H. PILLARD, *et al.*,
Petitioners,
v.
NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITIONS OF THE NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION, INC. ET AL. AND THE
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS ET AL.**

WILBUR D. PRESTON, JR.
(Counsel of Record)

ROBERT M. WRIGHT
GERSON B. MEHLMAN
JAMES R. CHASON

WHITEFORD, TAYLOR, PRESTON,
TRIMBLE & JOHNSTON
2000 First Maryland Building
25 South Charles Street
Baltimore, MD 21201
(301) 752-0987

ANTHONY J. OBADAL
ALAN D. CIRKER
ZIMMERMAN & OBADAL
1101 15th Street, N.W.
Washington, D.C. 20005

IRA GENBERG
STOKES, SHAPIRO, FUSSELL & GENBERG
2300 First National Bank Tower
Atlanta, GA 30303

QUESTION PRESENTED

This case involves a horizontal agreement to affect prices in the electrical construction industry that is unique only because the illegal agreement is contained in a clear, unambiguous written document between the defendants, which is confirmed by a simultaneously executed written memorandum of understanding and interpretation of that document. The agreement constitutes a naked form of horizontal price fixing by an association of electrical contractors in combination with a union which controls the supply of electrical workers in the electrical industry. The agreement equalizes costs by placing the equivalent of substantial association dues obligations—previously required only of members of the association—upon all electrical contractors who are not members of the association. The agreement adds a cost burden upon nonmember contractors with no equivalent cost burden being placed upon member contractors. The millions of dollars to be paid by the nonmember contractors goes to the defendant contractors association with no part of those funds being paid to the union or its members. The Complaint in this action was filed on August 5, 1977 prior to any payment by any affected contractor.*

No claim was made by the defendants to the United States Court of Appeals for the Fourth Circuit that the scheme was protected either by statutory or nonstatutory labor exemption. The United States Court of Appeals for the Fourth Circuit was correct in its decision and a writ of certiorari to that court in this case is not justified.

* The effective date of the Agreement was July 1, 1977 with the first payment due August 15, 1977. While the trial court has made no rulings on the amount of damages, defendants created their own potential damage liability with full notice of the plaintiffs' Complaint.

The question presented is:

Whether union participation in a business group's scheme to cause a cost increase in the form of a payment by non-member competitors to the business group, which payment is unrelated to wages, hours and working conditions, is price-fixing—a *per se* violation of § 1 of the Sherman Act.

PARTIES

Plaintiffs in the proceedings below included:

National Constructors Association
Commonwealth Electric Company
The Howard P. Foley Company
Donovan Construction Company of Minnesota, Inc.
Arthur McKee & Company, Inc.
Badger America, Inc.
Catalytic, Inc.
C. F. Braun Constructors, Inc.
Dravo Corporation
Guy F. Atkinson Company
The H. K. Ferguson Company
Jacobs Constructors, Inc.
Pullman Kellogg Division of Pullman, Inc.
Stearns-Roger, Inc.

Defendants in the proceedings below included:

National Electrical Contractors Association, Inc.
Robert L. Higgins
International Brotherhood of Electrical Workers
Charles H. Pillard
Colgan Electric Company, Inc.
Miller Electric Company
H. E. Autrey
Allen L. Bader
Frank H. Bertke
Donald C. Cates
Robert W. Colgan
Joe R. Devish
Carl T. Hinote
Allan H. Stroupe
L. R. McCord
Aldo P. Lero
Lowell C. Timm
John Ostrow
C. W. Stroupe
Warren Losh
J. D. Hilburn, Sr.

DISCLOSURE OF CORPORATE AFFILIATIONS

Guy F. Atkinson Company—A wholly owned subsidiary of Guy F. Atkinson Company of California, which is a publicly owned company.

Badger America, Inc.—A wholly owned subsidiary of the Badger Company, Inc. which in turn is a wholly owned subsidiary of the Raytheon Company. Raytheon Company is a publicly owned company.

Blount Brothers Corporation—Blount Brothers Corporation is a wholly owned subsidiary of Blount International Ltd. which in turn is a subsidiary of Blount, Inc. which is a publicly held company.

C. F. Braun Constructors, Inc.—A wholly owned subsidiary of C. F. Braun and Company, which in turn is a subsidiary of Santa Fe International Company, a publicly owned corporation.

Catalytic, Inc.—A wholly owned subsidiary of Air Products and Chemicals, Inc., a publicly held company.

Donovan Construction Company, Inc.—A wholly owned subsidiary of Donovan Companies, Inc. a publicly owned corporation.

H. K. Ferguson Company—A wholly owned subsidiary of Morrison-Knudson Company, Inc. which is a publicly held corporation.

Fluor Constructors, Inc.—A wholly owned subsidiary of Fluor Corporation, a publicly held company.

Jacobs Constructors, Inc.—A subsidiary of Jacobs/Wiese Constructors, Inc. which in turn is a subsidiary of Jacobs Engineering Group, Inc., a publicly held company. Other companies which are subsidiaries of Jacobs Engineering Group, Inc. but which are not wholly owned subsidiaries are: Jay Property Systems, Inc.; Jacobs Constructors of Puerto Rico, Inc.; Zellars-Williams, Inc.; Ohio-Atlas Construction Company; Quality Development Associates, Inc.;

Cameron Engineering, Inc.; Southern Instruments, Inc.; The Pace Company Consultants and Engineers, Inc.; UMC, Inc.; Jacobs International Ltd., Inc.; Allen M. Campbell Company General Contractors, Inc.; UMC of Louisiana, Inc.; and Jacobs International Ltd.

Henry J. Keiser Company—A subsidiary of Raymond Keiser Engineers, Inc. which in turn is a subsidiary of Raymond International, Inc. which is a publicly held company.

Koppers Company, Inc. Engineering and Construction Group—A wholly owned subsidiary of Koppers Company, Inc. a publicly owned corporation.

Leonard Construction Company—A wholly owned subsidiary of Monsanto Enviro-Chem Systems, Inc. which in turn is a wholly owned subsidiary of Monsanto Company, a publicly owned corporation.

Litwin Corporation—A subsidiary of AMCA International Ltd., a publicly held corporation.

Lummus Construction Company—A wholly owned subsidiary of Lummus Group, Inc. which in turn is a wholly owned subsidiary of Combustion Engineering, Inc., a publicly held corporation.

Mid-Valley, Inc.—A wholly owned subsidiary of Brown & Root, Inc. which in turn is a wholly owned subsidiary of the Holliburton Company, a publicly owned company.

Parsons Constructors, Inc.—A subsidiary of Parsons Corporation, a publicly owned company.

Procon Incorporated—A wholly owned subsidiary of Procon International, Inc. which is in turn a wholly owned subsidiary of UOP, Inc. which in turn is a wholly owned subsidiary of the Signals Companies, Inc. a publicly held corporation.

Stearns-Roger—Stearns-Roger, Incorporated is now known as The Former Stearns Roger of Colorado, Inc., which is

a wholly owned subsidiary of Stearns Roger World Corporation which in turn is a subsidiary of Air Products and Chemicals, Inc. a publicly held corporation.

Wisner & Becker Contracting Engineers—A wholly owned subsidiary of Guy F. Atkinson Company of California, a publicly owned corporation.

Dravo Corporation—A publicly held company with the following subsidiaries: Ratcliffe International Sales Company, Inc. and Holmes Company, Inc.

Kellogg-Rust Constructors, Inc.—The successor to Pullman Kellogg, Division of Pullman, Inc., is a wholly owned subsidiary of The Signal Companies, a publicly owned corporation.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

Nos. 82-1146
82-1147

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
(AFL-CIO), and CHARLES H. PILLARD, *et al.*,
Petitioners,
v.
NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit

**RESPONDENTS' BRIEF IN OPPOSITION TO THE
PETITIONS OF THE NATIONAL ELECTRICAL
CONTRACTORS ASSOCIATION, INC. ET AL. AND THE
INTERNATIONAL BROTHERHOOD OF ELECTRICAL
WORKERS ET AL.**

I

STATUTORY PROVISIONS

The relevant statutory provisions are:

1. Sherman Act, § 1, 15 USC § 1;
2. Clayton Act, § 16, 15 USC § 26.

Pertinent portions of these statutory provisions are reproduced in the appendix to the National Electrical Contractors Association Inc.'s, *et al.* Petition at pages 103a and 193a.

II

STATEMENT OF THE CASE

The issue in this case does not involve the legality of industry funds. This case does not involve the legality of multi-employer bargaining. What the case does involve is a union's agreement with a trade association to secure contributions from the association's competitors for the use of the association so as to eliminate the competitive advantage of non-members. The agreement on its face raises prices and interferes with price competition. The fund, whether or not labeled an "industry fund", is not so "intimately related to wages, hours and working conditions" as to justify insulation from the antitrust laws.¹ Thus, the case does not involve either the statutory or non-statutory labor exemption,² nor does it impinge upon or affect multi-employer collective bargaining.

Collective Bargaining Structure

The collective bargaining structure in the electrical construction industry is dominated by the IBEW and NECA. This structure existed prior to the agreement at issue in this case and was used to insure the success of that agreement.

¹ The defendant's position before the district court was that the fund at issue in this case was a concession to management. R at 1336 ["R" refers to the printed Joint Appendix in the United States Court of Appeals for the Fourth Circuit]. Industry funds have expressly been held not to be "intimately related to wages, hours and working conditions" as being essentially outside of the employment relationship. *National Labor Relations Board v. Sheet Metal Workers*, 575 F.2d 394 (2nd Cir. 1978); *National Labor Relations Board v. Local 264, Laborers*, 529 F.2d 778 (8th Cir. 1976); *National Labor Relations Board v. Detroit Resilient Floor Decorators Local 2265*, 136 NLRB 769, 771 (1962) *Enforced*, 317 F.2d 269 (6th Cir. 1963).

² These issues were not raised by Petitioners before the Fourth Circuit. *See, Infra*, Argument F.

NECA is the largest trade association in the industry, and consists of a national corporation and local chapters. Its members are both union and *non-union* electrical contractors.³ The chapters are organized in regional territories throughout the country, which coincide with the jurisdictions of one or more IBEW local unions. R at 2175. NECA is the only employer association in the electrical industry with which the IBEW bargains on a nationwide basis and NECA bargains only with the IBEW. R-94-95, 254, 338-39. The plaintiffs, with the exception of Foley and Commonwealth, are barred from NECA membership.⁴

Committees of NECA chapter members represent their membership in multi-employer bargaining negotiations with IBEW local unions in the chapter's territory, and periodically negotiate collective bargaining agreements with those unions. Nonmembers have no right to be on these committees or to vote on the collective bargaining agreement.⁵ These agreements negotiated by NECA and IBEW are known as "local agreements" or "working agreements". Although the IBEW negotiates with a few other local contractor associations, the overwhelming majority of Local Agreements are the result of bargaining between local unions and local NECA chapters. Most of these contain "most favored nations" clauses, which obligate the IBEW to grant to the parties to the agreement the benefits of any agreement entered into by the union and another employer in the same jurisdiction.⁶

³ Plaintiffs and Class members are union contractors.

⁴ NECA limits its membership to contractors whose principal business is electrical contracting. General contractors who hire electrical workers are barred from membership because they perform construction work in several crafts in addition to electrical construction. R at 248-51; 305-06; 715-16.

⁵ R at 1071; 1881-83; 2074; 2077-80; 2076-99; 2100-03.

⁶ R at 329; 1240. For typical language of these clauses see R at 1355.

Once the Local Agreement is negotiated it has been the IBEW's policy and practice for many years to secure from contractors letters of assent which bind the contractor to the terms of the NECA chapter-IBEW Local Agreement for the area in which the contractor wishes to work.⁷ A second method by which a contractor enters into an agreement with the IBEW is by signing an International Agreement. This is a standard form agreement issued by the IBEW to some general contractors who perform work at different sites across the country. It is in effect a nationwide letter of assent which binds the signatory to the terms and conditions of the Local Agreement for any geographic area in which the general contractor wishes to hire IBEW labor.⁸ A third means of negotiating with the IBEW is by signing a Project Agreement. A Project Agreement is designed to cover a single construction project. The IBEW seeks to procure the terms of the Local Agreement in any Project Agreement.⁹

It is very unusual for the IBEW to negotiate an independent agreement with a single contractor. The scenario of bargaining was explained by IBEW International President Farnan as involving the union giving a contractor a letter of assent. If the contractor refused to sign the assent, it was "not normal" for the union to sign or negotiate a separate agreement other than an assent.¹⁰

* * *

⁷ R-2175. The overwhelming majority of contractors seeking IBEW labor sign letters of assent. Letters of assent are non-negotiable standard form agreements prepared by the IBEW.

⁸ R at 2176. Similar to letters of assent it is for all practical purposes non-negotiable. R-1725-28.

⁹ R-2176. Generally a Project Agreement is negotiated with the Building Trades' Council in the area since it covers all crafts and is used only on large industrial projects. The IBEW seeks to procure the terms of Local Agreements, including the NEIF, in Project Agreements. R-3341-42; 351-52; 1261-74.

¹⁰ R-335-36; 394-402; 1164. The policy of requiring Assents is very well known in the industry. R-332-34; 401-02.

As of December, 1976, six months before the implementation of the agreement at issue in this case, the vast majority of contractors in the electrical construction industry procured IBEW labor under the terms and conditions of the Local NECA Chapter—Local IBEW Union Local Agreements, either as members of local NECA chapters or as signatories to Letters of Assent or International Agreements.¹¹

NECA Dues Structure Prior To The National Agreement

Prior to the negotiation of the National Agreement,¹² NECA members paid dues in the amount of \$50.00 per year plus a service charge of up to 1% of their productive labor payroll, 20% of which went to NECA National with the balance retained in the local chapter. R at 719-20. Non-NECA contractors did not have these dues obligations. In collateral litigation filed by NECA to collect payments from plaintiffs who resisted paying into the NEIF, NECA officials filed affidavits stating:

Over the years of my association with the electrical contracting industry, I have frequently seen situations where the difference between a successful bid for a contract and the next lowest bid was much less than 1% of the successful contractor's anticipated payroll expenses for the product. This is because ma-

¹¹ R-2176.

¹² The agreement at issue in this case. The title of the agreement at issue is merely "Agreement" and in these proceedings has been colloquially referred to as the "National Agreement". The term "National Collective Bargaining Agreement" as used in the NECA petition is an appellation conjured for purposes of appeal. The agreement is not a collective bargaining agreement in the legal sense since the National NECA Corporation and the International Office of the IBEW have not been designated as bargaining agents for anyone. Letters of Assent "A" authorize only the local NECA chapter to be a bargaining representative with the local IBEW union. Letter of Assent "B" adopt the terms of the local agreement but do not designate any bargaining agent. App-4a [All appendix references are to the appendix to the NECA Petition unless otherwise indicated]. *IBEW* Petition at n.2.

terial and labor costs vary little between competing contractors. If the Howard P. Foley Company and other contractors are permitted to evade payment of the 1% of their payroll costs to the NEIF, they will thus be placed in a highly unfair competitive position with respect to other contractors who continue to observe their contractual obligation in this regard. R-944; 950; 956-57, *quoted* in the District Court Opinion, NECA Appendix at 63a.¹³

The effect of the National Agreement was to cause all contractors in the industry to pay 1% of their payroll to NECA.¹⁴

The National Agreement And Memorandum of Understanding

In the Spring of 1976, the International Office of the IBEW and the NECA National Corporation tentatively

¹³ The importance of the 1% differential was further stated by counsel for the NEIF as follows:

[Contractors who do not pay into the NEIF] are going to get an extra boost. *They are going to have to be able to be so competitively placed that they have an advantage over the local contractors, members of the local [NECA] chapter. They will not have to pay pending all this litigation which can go on for years in Maryland. They will not have to pay one cent towards this fund which every other contractor here will have to pay.*

* * * *

(Mr. Tobin) . . . That is exactly the point. In the interim [the contractor refusing to pay] is getting a competitive advantage over everyone else. He, therefore, gets the bid. He can beat them out. There is nothing that anybody can get from it thereafterwards. We are coming in here merely for his allowance. That is Number One.

Number Two, and perhaps even more important, he doesn't pay his competitors—the hundreds and hundreds of other electrical contractors that are situated in Southern California—they see he gets away with that 1%. *That 1% is a big thing. App. at 63a-64a (emphasis added).*

¹⁴ It is to be noted that plaintiff contractors also must pay to support their own trade association—a cost not shared by NECA contractors.

agreed to the agreement at issue in this case known as the "National Agreement".¹⁵ In contrast to other provisions of the agreement, which are applicable only to agreements between local NECA chapters and IBEW local unions, Article Six of the agreement establishing the National Electrical Industry Fund (NEIF) expressly states that it should be placed in *all construction agreements in the industry*. To avoid any question as to the meaning of their agreement the parties executed another document entitled "Understanding and Interpretations of the IBEW-NECA Agreement". This document is not reproduced in the Appendix of any of the Petitioners in this case but is quoted in the District Court's Opinion. NECA App. at 55a. The agreement states that the intent of Article Six was to insert the Industry Fund provision into all IBEW construction agreements containing the NEBF language.¹⁶ An affidavit filed in other litigation by the Administrative Assistant to the International President of the IBEW explained that the NEBF language is contained in all IBEW collective bargaining agreements.¹⁷ All of the individuals involved in the creation of the National Agreement knew that the NEBF was in all construction contracts in the electrical construction industry.¹⁸ The intention to insert the requirement to contribute to the NEIF in all IBEW construction agreements is also reflected in many other contemporaneous documents and statements. See District Court Opinion, NECA App. at 55a-57a; 61a-64a.

Implementation Of The Agreement

While the manner of implementation of the Agreement at issue in this case is not relevant, it is instructive. On

¹⁵ The agreement is reproduced in the NECA Appendix at 173a.

¹⁶ A reference to the National Electrical Benefit Fund, which had been in existence since 1947.

¹⁷ The affidavit is quoted in the District Court Opinion NECA App. at 55a. As to the full text of the Memorandum of Understanding and Mr. Loftis' affidavit see R-1076-79 and R-1249.

¹⁸ R-263-65; 361-65; 379-81.

December 16, 1976, the IBEW directed its locals to insert the provisions of the National Agreement into local agreements with NECA chapters. That directive also stated:

You will be furnished, by separate letter, instructions for non-NECA chapter agreements and other chapter agreements with the 1% [NEBF] clause outside the construction industry.

R. at 1146.

The letter instruction from IBEW to its locals for non-NECA agreements was issued on December 28, 1976, and was addressed as follows:

To: All Local Unions Who Have Agreements Containing The 1% NEBF Clause.

The letter of direction contained in part the following directive:

For all agreements except the NECA chapter construction agreements, the Local Union is to notify ALL employers who have agreements with the Local Union which presently contain the 1% clause and request that the agreement be opened by mutual consent to include the applicable sections in the agreement; specifically:

FOR ALL NON-NECA INSIDE AND OUTSIDE
CONSTRUCTION AMENDMENTS

. . . .

Article VI—Industry Fund. This is to be inserted in all inside and outside construction agreements.

R. at 781.

Contractors who were not members of NECA but who had previously assented to a local agreement prior to the creation of the NEIF were advised that they were now obligated to make payments. Since the IBEW procured agreements assenting to the terms and conditions of the local NECA-IBEW agreement from the vast majority of contractors in the electrical industry who are not members of NECA, the National Agreement was effective

solely through the changing of the local agreements. *IBEW Petition* at 7. By amending these agreements, the Petitioners placed an additional cost burden on these contractors without regard to later efforts to secure additional assents or to place the NEIF in other collective bargaining agreements in the electrical construction industry.

As to assents executed after the date of the National Agreement the IBEW, pursuant to their agreement with NECA, had the contractor execute a letter of assent which adopted the local NECA chapter-IBEW local agreement which included the NEIF provisions. Where a contractor attempted to exclude from the assent the requirement to pay into the NEIF, the IBEW refused to allow the exclusion.¹⁹ Where a contractor refused to accept an assent letter which did not exclude the NEIF, IBEW President Pillard instructed his local unions that they could not bargain to impasse since the NEIF was a non-mandatory subject of bargaining but they could bargain for items equal to or in excess of 1% in an independent agreement.²⁰ Nine months after the issuance of President Pillard's instructions, International Vice President Moore wrote the following to an IBEW business manager in connection with a negotiation where a contractor had attempted to exclude the NEIF under a letter of assent:

Please notify Donovan Construction Company that you cannot accept an altered letter of assent. They must sign a standard unmodified Letter of Assent 'B' or Letter of Assent 'A', or you will sit down and negotiate a separate agreement with them. However, in that agreement be sure and ask for considerably above your present wage rate and add all kinds of fringe benefits to your request. After they receive your request, they will be more than happy to receive a standard Letter of Assent. R-1237.

¹⁹ R-1222-24.

²⁰ R-777-79; 1166-77; 1237; 1241-42.

In implementing the instructions of President Pillard, Commonwealth Electric Company was notified by an IBEW business manager that the NEIF was an economic accommodation on the part of IBEW which lessened employers' ability to increase benefits for IBEW members. Therefore, when an employer did not pay the NEIF it allowed the IBEW to achieve increased benefits without subjecting the employer to a "competitive disadvantage against their NEIF contributing counterparts."²¹ As a result, as of June 1978, well over 90% of the contractors in the industry had executed letters of assent adopting agreements including the NEIF. For those who refused, the negotiation of substitute payments equaling the 1% became commonplace. An example of negotiation of substitute payments is correspondence reflecting the pattern of negotiations between Local Union 1249 and a contractors' association known as the New York State Line Construction Contractors, Inc., which is not associated with NECA. The agreement negotiated did not include the NEIF but expressly in its place called for the employer to contribute an additional three-quarters of 1% into the local union's training fund and a quarter of 1% into the apprentice program. The correspondence reflects it was a clear substitution for the NEIF.²² The "most favored nations clause" was viewed by some local unions as requiring the negotiation of substitutes for the fund so as to equalize non-NECA contractors' costs.²³

Administration And Use Of NEIF Funds

The NEIF is structured so as to be within the total control of the National Electrical Contractors Association

²¹ R-1238-39.

²² R at 1231-34. The Petitioner's mention some 800 assents which did not have the NEIF, including certain contracts held by the Foley Company. This is not material to the application of the anti-trust laws, particularly considering the existence of in excess of 12,000 assents by non-NECA contractors who are obligated to pay the NEIF. Moreover, many of these agreements, if not all, contained substitutes for the NEIF.

²³ R-1240.

and its local chapters. It is in fact structured so as to be merely a part of these organizations and a conduit for funds. The NECA National Executive Committee appointed itself as trustees with the Collection Agents being the local chapter business managers.²⁴ Funds are received initially by the local NECA collection agent who forwards an amount equal to .2 of 1% of the contributing company's labor payroll to the National Office of NECA, and retains the balance. The trust recites twelve broad purposes for the funds which are viewed by NECA as allowing payment of all NECA expenses with the exception of purely social activities.²⁵ NEIF monies are used to pay over 90% of the operating expenses of NECA National and its chapters.²⁶ None of these monies are paid to IBEW members and the IBEW does not participate in

²⁴ R-508.

²⁵ R at 1068-75; 2104-12. Chapter dinner meetings, golf outings, and even lunches for women associated with the NECA are reimbursable from NEIF if they are deemed to have some relationship to NECA's business. R at 639-43; 646; 1068-75. The NEIF also pays for NECA National and Regional conventions. It is also used for recruitment of NECA members, training of chapter managers, NECA dues in other trade associations in which NECA is a member, liability insurance, retirement plans, and marketing service programs to aid members in increasing their share of the electrical contracting market. R at 274-78; 494-96; 499-502; 634-35; 638; 643-50. The NEIF was, of course, also used to pay the cost of this litigation. R. at 488. It is used to pay for studies supporting the view that owners should let electrical contracts directly to electrical specialty contractors, rather than to allow general contractors to perform electrical work. R at 1959-65; 1969-75. This is, of course, against the interest of many of the plaintiffs.

²⁶ NECA National's budget for 1978 reflected estimated expenditures of \$4,730,494 of which NEIF would pay \$4,648,133. For 1979, NECA's budget called for expenditures of \$5,704,550 of which the NEIF would pay \$5,500,882. R at 1976-96. (also giving itemized breakdowns of expenditures with the figures for 1978 being based on actual expenditures and reimbursements with the exception that the December figures were not final.) This document also contains written descriptions of the various major NECA budget items. Insofar as local NECA chapters are concerned, a large sampling of chapter financial statements showing the relation of NEIF dis-

the administration of the trust. NECA has been in existence since 1901 and has operated successfully without the benefits of a trade association promotion fund since that time.²⁷ Its officials testified that it had no financial difficulty prior to the institution of the agreement at issue and that NECA's financial condition at that time was excellent.²⁸

As might be expected, NECA collected more in revenues than it could spend. In the first eighteen months of operation the fund showed a surplus of almost three million dollars,²⁹ notwithstanding directives from NECA to its chapters that they should budget their expenditures to insure that all monies collected were spent.³⁰ During 1979, NECA at the national level was accumulating surpluses at the rate of approximately \$700,000 per year, and as a result distributed a million dollars of surplus to the chapters as well as issuing directives to them "to avoid the accumulation of significant NEIF surpluses".³¹

bursements to chapter expenses are contained as Exhibits to depositions of Bertke, Devish, Bader, Cates, Hinote, Ostrow, Stroupe and Losh. Samples are contained in R at 1884-1956; 2017-56; 2081-95. See NECA National budget documents at R-1976-96. Local chapter financial reports at 1884-1956; 2017-56; 2081-95.

²⁷ The Council on Industrial Relations mentioned by NECA in its Petition has existed since 1921. As indicated in NECA's Petition, only NECA and IBEW representatives sit on that council and membership is restricted to NECA and IBEW members. The Council was used by the defendants as an instrument to implement their conspiracy by requiring NEIF payments from dissident contractors. With regard to training, all contractors, regardless of NECA membership, pay into training funds for the training of IBEW workers. The Injunction issued in this case does not affect these payments and they have continued.

²⁸ R-651, 577-78; 2113; 2118-19.

²⁹ R-504. For an example of accumulation of surpluses in a chapter see R-2066-73.

³⁰ R-527.

³¹ R-1966-68; 1997-2016.

NEIF is NECA's alter ego, with its funds controlled and expended by the same individuals. Acting as NECA officials, they submit NECA's expenses to the NEIF for funding, and then, switching hats and acting as NEIF officials, they review the requests, approve them and release the funds to NECA.³² There is no certified audit at either the local level or national level. The NEIF has no employees as its functions are performed by NECA employees. NECA and the NEIF occupy the same offices in Bethesda, Maryland. NECA has no offices, signs or other indicia differentiating NEIF from NECA.

As can be seen from the budget documents and local chapter financial reports that are in the record, the amount of NEIF monies spent on labor relations is extremely small in relation to total expenditures.³³ *See also, NECA Petition* at 5.

III

ARGUMENT

THERE ARE NO SPECIAL OR IMPORTANT REASONS FOR REVIEW ON WRIT OF CERTIORARI

The courts below, consistent with the prior decisions of this Court, have ruled that the antitrust laws prohibit a group of businessmen (NECA) from combining with a union (IBEW) to raise the costs paid by the group's competitors (plaintiffs and class members), which costs relate to the group members' costs of belonging to a trade association. Contractors who are members of NECA, and plaintiffs and class members are competitors in the electrical construction industry. Prior to the defendants' scheme, NECA contractors paid 1% of their electrical

³² R-244-47; 489-93.

³³ The National NECA budget documents reflect that of \$10,149,015.00 collected from NEIF at the national level only \$868,306 was spent on labor relations. R-1976. At the local level the percentage spent on labor relations is generally even less. R-1884-1956; 2017-56.

payroll to NECA as part of their NECA dues. With the defendants' National Agreement, "all construction agreements in the electrical industry" were to contain a clause requiring payment of 1% of the employers' gross electrical payroll into the NEIF, the alter ego of NECA. The 1% NEIF surcharge replaced the 1% NECA dues obligation previously borne by NECA contractors. This charge became an additional expense for contractors who chose not to belong to NECA.

Thus, an element of price competition between NECA contractors and plaintiffs and class members was eliminated, adding millions of dollars to plaintiffs and class members' costs. The beneficiaries of this equalization of costs were the NECA contractors who placed their competitors at a competitive disadvantage when competing against the NECA contractors,³⁴ and NECA, the recipient of the additional funds.³⁵ The parties damaged by the scheme were plaintiffs and class members, who pursuant to the agreement must pay tribute to NECA, and the American public, who eventually pay the millions of dollars in costs added to construction projects.

The elimination of price competition in this case clearly constitutes price fixing. As noted below by the Fourth Circuit, "(t)o be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing. An activity can violate the *per se* rule even if its effect upon prices is indirect."

³⁴ The importance of the 1% differential was sworn to by NECA chapter managers and NEIF collection agents in affidavits filed in proceedings to collect the NEIF from non-NECA contractors. These affidavits, quoted *supra*, noted that the 1% differential prior to the National Agreement was "frequently . . . the difference between a successful bid for a contract and the next lowest bid" The importance of the 1% differential was further stated by counsel for the NEIF. See n.13, *supra*.

³⁵ Although the funds were technically paid into the NEIF, as noted previously, the NEIF is the alter ego of NECA and NEIF monies are used to pay virtually all of NECA's expenses.

NECA App. at 14a. Concerted action which eliminates an element of price competition between competitors has been condemned as price fixing, a *per se* restraint of trade. In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), this Court noted that an agreement to eliminate credit sales extinguished one form of competition among sellers, *id.* at 649, and held the arrangement to be a *per se* unreasonable restraint of trade. *Id.* at 650. In *United States v. General Motors, Inc.*, 384 U.S. 127 (1966), this Court held that an agreement between General Motors and some of its dealers to eliminate sales to dealers who sold to discounters was both a boycott and *per se* illegal price fixing. As found by the Court, a restraint upon "real or apparent price competition" between competitors is "unlawful *per se* when sought to be effected by combination of conspiracy." *Id.* at 147. As stated by the Court, "[t]he protection of price competition from conspiratorial restraint is an object of special solicitude under the antitrust laws." *Id.* at 148.

The fact that one of the conspirators in this case was a union and that the defendants effected the elimination of price competition by agreeing to place the restraint in collective bargaining agreements³⁶ does not transform the *per se* price fixing into some nebulous restraint that must be judged under the rule of reason. The IBEW's

³⁶ The Defendants in their Petitions give the impression that the National Agreement itself was a collective bargaining agreement and the National NECA was somehow representing a multi-employer bargaining unit that included plaintiffs and class members. This is simply untrue. The National Agreement concerned what the defendants desired to go into the collective bargaining agreements between the local unions and the employers. While the scope of most of the clauses in the National Agreement were confined to the local union—local NECA chapter agreements, Article Six providing for the NEIF contribution was to be placed in "all construction agreements in the electrical industry." NECA National was never designated by any plaintiff or class of member as their bargaining representative.

role in this scheme was completely removed from the union's purpose of bettering the lot of union electricians. The union, employing the awesome power granted to it under the labor laws, was nothing more than the "muscle" used by the NECA contractors to require contractors who were not members of NECA to pay the same costs as NECA contractors.³⁷ Conceptually, the IBEW's role in the instant case mirrors the role played by General Motors in *United States v. General Motors, supra*; that is, a dominant force dealt with by all competitors that interfered with price competition between the competitors. Since at least *Allen Bradley Company v. Local Union No. 3, IBEW*, 325 U.S. 797 (1945), it has been clear that the labor laws do not permit, and the antitrust laws forbid, a union from interfering with competition between employers over matters that do not relate to the wages, hours, and working conditions of union members. Even where the union is aiding an employers association in seeking to spread the costs of bargaining with the union, the Court has held that such an endeavor is not protected by labor law or policy, but is anticompetitive.

³⁷ The NECA defendants devote a section of their petition at 15-19 to reiterating the NLRB finding that the union did not violate labor laws by bargaining to impasse with non-NECA contractors over the NEIF. As found by the NLRB's general counsel, however, the union's policy was at least to request the NEIF from non-NECA contractors during negotiations. NECA Petition at 15. As shown by the undisputed evidence below, where an employer refused to accept the NEIF, the union obtained a substitute provision to secure the 1% surcharge. See, text accompanying notes 21-23, *supra*. While coercion may be an element to a labor law violation, it is not a required element of a price fixing violation. Even assuming that the union never coerced a contractor into accepting the NEIF provision, and assuming that in some cases the union was unable even to obtain a substitute, this only means that in a few instances the defendants' scheme to eliminate price competition was unsuccessful. It does not change the fact that where the union requested the NEIF or a substitute pursuant to the National Agreement, and obtained such a provision, price competition was eliminated. It is well settled that a price fixing conspiracy need not be 100% effective to be condemned as illegal.

Federal Maritime Commission v. Pacific Maritime Association, 435 U.S. 40 (1978).

That the tools used to implement the restraint were collective bargaining agreements with the local unions does not change the application of the antitrust laws to this case. A collective bargaining agreement is the mechanism through which labor unions act. The object of the restraint, the NEIF, although contained in the local collective bargaining agreements, has no relationship to the wages, hours or working conditions of IBEW members. Union members do not see one penny of the money collected by the NEIF. It is all transmitted to NECA. To the extent that the defendants extol the virtues of the NECA services paid for by the NEIF, this is nothing more than the type of justification claimed by price fixers in every case. The benefits the defendants claim, even if true, are legally irrelevant. See *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2477-79 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

The defendants have filed two Petitions for Certiorari. Defendants' contentions that the decisions below conflict with decisions of other circuits or this Court's decisions are illusory. A fair reading of the two opinions below show that they are based on fundamental principles of antitrust law and in fact explore no new ground.

A. There Is No Holding In The Instant Case That Collective Bargaining Agreements Which Contain An Industry Fund Provision Are Illegal

First, the NECA defendants suggest that the Fourth Circuit's opinion is a case of first impression that would outlaw all collective bargaining agreements that contain an industry fund provision. NECA Petition at 12-14. Only by ascribing to the Fourth Circuit's opinion a holding that does not appear therein do the defendants create their issue of "first impression." NECA Petition at 12. Neither court below held that industry funds are illegal

or that agreements providing for industry funds are illegal. What was condemned in this case was the defendants' agreement which required "[a]ll construction agreements in the electrical industry" to contain language requiring an employer of IBEW members to contribute to NECA. The industry fund, which is the alter ego of NECA, is merely the recipient of the scheme to equalize costs. Rather than benefiting themselves, if the NECA defendants had chosen a charitable organization as the beneficiary of their scheme to equalize price competition, the result in the instant case would be the same. The charity would not be illegal. In short, it is the agreement to equalize costs by using the NEIF as the method which is illegal, not the NEIF itself.

B. An Agreement to Equalize The Costs of Belonging To A Trade Association Is Price Fixing In A Commercial Market Irrespective Of Whether There Is Direct Proof That The Costs Were Passed On

Both petitions filed by defendants urge that certiorari be granted because the courts below impermissibly expand the *per se* rule to include price fixing where there was no direct proof that the increase in plaintiffs' and class members' costs brought about by the defendants' scheme was passed on by plaintiffs and class members to their customers. *IBEW Petition* at 21-24; *NECA Petition* at 19-22. NECA argues that without such a showing, there can be no finding of an effect on commercial competition.

Where an agreement interferes with price competition between competitors, it is *per se* an unreasonable restraint of trade, even if the effect upon prices is indirect. *Catalano, supra*, 446 U.S. at 647; *United States v. General Motors, supra*, 384 U.S. at 147-48. See also *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690 (1978). Even if it is assumed that non-NECA contractors absorbed the additional costs represented by NEIF payments, this is immaterial. As noted

by this Court in *Catalano*, "the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*." 446 U.S. at 649. Similarly, whether or not non-NECA contractors passed on the additional costs represented by the NEIF is immaterial. *Hanover Shoe, Inc. v. United Shoe Machinery*, 392 U.S. 481 (1968). It is enough that the plaintiffs' costs were increased. At best, the defendants' contention appears to be a claim that the raise in costs represented by the NEIF was reasonable, a contention which is immaterial in a price fixing case. *United States v. Socony Vacuum*, 310 U.S. 150, 213. The point is that, "[a]ny combination which tampers with price structures is engaged in an unlawful activity . . . The [Sherman] Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference." 310 U.S. at 221. By tampering with the costs paid by non-NECA contractors, the defendants tampered with price structures, regardless of whether these costs were passed on or absorbed.

Similarly, whether or not these increased costs were passed on to plaintiffs' and class members' customers has no effect on the determination of whether the restraint affected commercial competition. The NECA defendants rely primarily on *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) in contending that the courts below ignored the requirement that the restraint on competition fall on commercial competition. In *Apex Hosiery*, the Court, relying in part on § 6 of the Clayton Act (15 U.S.C. § 17), stated that restraints on competition *between employees* in the seeking of the same wages, hours or working conditions are restraints on the labor market and not within the Sherman Act's prohibition. *Id.* at 503-04. The Court noted that the restraint must fall on commercial competition and not on competition between employers concerning what they pay their employees. See also *Connell Construction Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 622 (1975) ("[L]abor policy requires toler-

ance for the lessening of business competition based on differences in wages and working conditions").

In the instant case, however, the amounts to be paid by contractors to the NEIF have nothing to do with the wages, hours and working conditions of IBEW members. As such, the restraint is not visited upon competition in the labor market as it does not have anything to do with competition between NECA and non-NECA contractors concerning what they pay their employees in wages or fringe benefits. The price competition being restrained is that *between employers*; that is, what NECA contractors were paying to belong to NECA which was not being paid by non-NECA contractors.

Moreover, even if such proof were required, the effect of the scheme on prices is obvious. Further, when the defendants were trying to secure NEIF payments from non-NECA contractors, they admitted that the 1% increase would affect commercial competition. See text accompanying n.13 and n.13, *supra*. These admissions were quoted in the district court's opinion below. *NECA App.* at 61a-64a.

C. The Restraint Has No Relationship To The Elimination of "Free Riders"

The IBEW defendants contend that the decisions of the courts below finding their agreement illegal conflict with other judicial decisions that permit contracting parties to eliminate third parties from being "free riders." *IBEW Petition* at 18-21. Similarly, the NECA defendants argue that the Fourth Circuit's opinion disregards the benefits conferred by the NEIF and ignores the elimination of "free riders" as a permissible purpose. *NECA Petition* at 13-14.

The "free rider" argument is premised on the proposition that non-NECA contractors receive specific "services" from the local NECA chapters in that the chapters negotiate and administer the collective bargaining agreements with the local unions. Therefore, according to the defendants, the opinions below eliminate the rights of

such persons to insist upon payment when the services are used by third parties.

The undisputed evidence shows, however, that the 1% surcharge agreed upon by the defendants has no relationship to any costs incurred by NECA chapters in negotiating with the local unions or administering the collective bargaining agreements. See note 33, *supra*. Indeed, this is recognized by the NECA defendants in their Petition to this Court:

The Fund was intended as something more than a mechanism through which NECA and non-NECA contractors could pay their fair share of the expenses of negotiating and administering industry collective bargaining agreements and other similar services. It also intended to increase the funds available to improve the quantity and quality of the services which NECA provided the entire electrical construction industry.

NECA Petition at 5-6. The evidence shows that the 1% surcharge is related to the previous cost of NECA dues, and not to the costs of any services performed by the defendants for the plaintiffs and class members. The defendants seem unable to comprehend that plaintiffs and class members do not want to belong to NECA and pay NECA dues.

Further, the "free rider" argument falls flat on its face in view of the scope of the defendants' illegal agreement. The agreement applied to "all construction agreements in the electrical industry", not just those that were negotiated and administered by NECA. Nowhere do the defendants attempt to explain how non-NECA contractors who were not parties to a local NECA chapter agreement were "free riders". In short, the "free rider" argument is a "catch phrase" justification fabricated after the agreement which is simply unsupported in the record.³⁵

³⁵ Every employer bargaining group desires that a union offer no better terms or conditions to non-members of the group. This is the reason for the "most favored nations" clause. It is clear that NECA does not intend to provide any benefits to non-members.

Finally, the Court in *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978) rejected the proposition that an employers' association together with a union may attempt to equalize non-members' costs with the costs incurred by the association in negotiating with the union. The agreement at issue in the case was between the Longshoremen's Union and PMA, an employers' association made up of union employers. Prior to that agreement, non-PMA employers secured their union work force from PMA-union hiring halls and made fringe benefits payments to funds maintained by PMA as a result of agreements with the union. Non-PMA employers did not pay PMA dues. PMA sought to eliminate the non-members "free ride", and the union and PMA placed a provision in their agreement by which the union agreed that non-members would pay the same dues and assessments as PMA members as a condition of using the hiring halls and paying into the fringe benefit funds. *Id.* at 47.

Several non-PMA employers filed a petition with the Maritime Commission claiming that the above-described agreement was subject to disapproval. Upon reaching this Court, the Court found that the labor exemption would not apply in light of the fact that the union had agreed to seek the terms from employers other than those who were members of PMA. *Id.* at 61.³⁰ The Court went on to agree with the Maritime Commission that an agreement to place PMA employers and non-PMA employers on the same competitive basis with regard to PMA dues was anticompetitive. *Id.* at 62-63. This is precisely the same situation in the instant case.

³⁰ The labor exemption to the antitrust laws also applies to the Shipping Act, although it is not necessarily "always exactly congruent." 435 U.S. at 52; 60-63.

D. The Decisions Below Do Not Conflict With The Court's Decision In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("CBS")

The IBEW defendants contend that certiorari should be granted to resolve the conflict between the decisions below and the Court's holding in *CBS*. *IBEW Petition* at 13-18. The alleged conflict does not exist.

The contention in *CBS* was that the composers of musical compositions through their associations, ASCAP or BMI, had combined to fix the price of their compositions by requiring a licensee such as the plaintiff, CBS, to purchase a blanket license to use all of the compositions. CBS desired the right to purchase a limited license for the use of specific compositions. The Court held that the composers were trying to protect the rights granted to them by the copyright laws and a blanket license was merely a method to market a unique product. See also, *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466, 2479-80 (1982).

Here, the basis of the decision below is that the union combined with NECA to raise the prices paid by another group of competitors. In *CBS*, there was no allegation that the composers or ASCAP or BMI had combined with the *competitors* of CBS to raise CBS' prices. In the instant case, the IBEW agreed with plaintiffs' and class members' competitors to attempt to secure the 1% surcharge. This basic difference renders the *CBS* case inapposite.

E. There Is No Basis For Judging The Restraint In The Instant Case Under The Rule Of Reason Merely Because A Union Is A Party To The Agreement

The NECA defendants request the Court to grant certiorari to rule upon whether a restraint of trade involving a union can be subject to the *per se* rule. *NECA Petition* at 22-24. The defendants maintain that other circuits, as well as this Court in *Connell Construction*

Co. v. Plumbers & Steamfitters, Local Union 100, 421 U.S. 616 (1975), have held that the *per se* rule cannot apply to a collective bargaining agreement. It is most important to note that the IBEW does not join in requesting the Court to take certiorari on this point.

The first of several flaws in the defendants' position is their statement that the restraint of trade in the instant case emerged out of a collective bargaining agreement. The National Agreement was not a collective bargaining agreement. At best, it was a side agreement between the union and National NECA as to what would go into collective bargaining agreements negotiated by the local unions and local NECA chapters.

Further, even assuming the restraint was in a collective bargaining agreement, there is no basis to carve a third exemption to the antitrust laws for a labor union. There is a basic conflict between the labor laws and the antitrust laws. The design of the labor laws is to authorize the formation of unions to obtain uniformity of labor standards, thereby eliminating competition between workers concerning conditions of employment. The design of the antitrust laws is to promote competition. *H.A. Artists & Associates, Inc. v. Actors' Equity Association*, 101 S.Ct. 2102, 2108 (1981). The conflict is resolved by application of the statutory and nonstatutory exemptions to the antitrust laws. Where a union acts to eliminate competition between employers regarding workers' conditions of employment, the union is exempt from application of the antitrust laws under the statutory exemption if it acts alone, and under the nonstatutory exemption if the restraint is "intimately related to the union's vital concerns of wages, hours and working conditions." *Id.* at 2109-10 n. 19.

The labor movement in this country need not fear undue application of the antitrust laws as long as the restraint of trade at issue in a case involves labor's legitimate concerns. The opinions below clearly recognize this

distinction. As found by the courts below, where the union has moved beyond its legitimate concerns and is a party to a restraint on price competition between employers concerning what the employers decide to pay a trade association, the union is no longer furthering its own purposes but instead is interfering in the open and free competition between employers mandated by the antitrust laws. There is simply no reason to carve out another exemption to the antitrust laws where the union acts in such a manner. As long ago as *Allen Bradley Co. v. Electrical Workers Local No. 3, IBEW*, 325 U.S. 797 (1945), the Court stated:

[W]e think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services.

• • • •

[I]f business groups, by combining with *labor unions* can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves.

Id. at 808; 810 (emphasis added).

Further, the power afforded to unions by the labor laws is of such a nature that it would be counter productive to insulate them further from antitrust scrutiny. This Court recently recognized this power in the *Actors Equity* case, stating that "[l]abor unions are lawful combinations that serve the collective interests of workers, but they also possess the power to control the character of competition in an industry." 101 S.Ct. at 2108. Where, as in the instant case, the union is not acting to serve the collective interests of workers, but is instead abusing its powers to aid one group of employers against another group, it would be sheer folly to add to the union's powers.

Finally, the conflict alleged by the defendants is simply non-existent. Nowhere in *Connell* did the Court express

a desire to afford labor unions another escape from application of the antitrust laws. Nowhere in the three circuit court cases cited by the defendants, *Berman Enterprises, Inc. v. Local 333, Int'l Longshoremen's Ass'n*, 644 F.2d 930 (2d Cir. 1981); *Meat Cutters Local 576 v. Wetterau Foods, Inc.*, 597 F.2d 133 (8th Cir. 1979); and *Smitty Baker Coal Co. v. United Mine Workers*, 620 F.2d 416 (4th Cir. 1980), *cert. denied*, 449 U.S. 870 (1980), is it held or even stated that the *per se* rule would not apply because a union was involved. As best, those cases stand for the proposition that where a union is seeking a legitimate union goal, the anticompetitive effects and/or purpose of a restraint must be examined to determine if they outweigh the labor benefit, thereby forfeiting the nonstatutory exemption. See *Connell Construction Co.*, *supra*, 421 U.S. at 625. Where the restraint does not involve the union seeking to better or protect its members' employment conditions, none of these cases indicate that price fixing would be judged under the rule of reason as opposed to the *per se* rule.

F. The Nonstatutory Labor Exemption Was Not Raised By The Defendants Before The Fourth Circuit And In Any Event Is Not Applicable

The IBEW defendants maintain that the nonstatutory exemption should apply to the restraint in the instant case. *IBEW Petition* at 24-26. The Court should deny certiorari on this issue because it was not raised by the defendants before the Fourth Circuit. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). Notwithstanding the failure to raise this issue on appeal, the Court should not grant certiorari because it is obvious that the nonstatutory exemption would not apply. As noted by the Court in *Actors' Equity*:

Even where there are union agreements with non-labor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory"

exemption to shield such agreements *if they are intimately related to the union's vital concerns of wages, hours and working conditions.*

101 S.Ct. at 2110 n. 19 (emphasis added).

Here, the beneficiary of the restraint is an industry fund which is used to pay the expenses of a trade association. Industry funds have been held to be non-mandatory subjects of collective bargaining precisely because they are not related to workers' wages, hours and working conditions. *National Labor Relations Board v. Sheet Metal Workers*, 575 F.2d 394 (2d Cir. 1978); *National Labor Relations Board v. Local 264, Laborers*, 529 F.2d 778 (8th Cir. 1976). In the seminal case discussing industry funds and their place with regard to labor policy, the NLRB noted that "[a]n industry promotion fund seems to us to be *outside* of the employment relationship." *National Labor Relations Board v. Detroit Resilient Floor Decorators Local 2265*, 136 NLRB 769, 771 (1962), *enforced* 317 F.2d 269 (6th Cir. 1963) (emphasis added). The point is that the NEIF is not related to the wages, hours or working conditions of union members; *a fortiori* it is not intimately related. Thus, the exemption would not apply.⁴⁰

⁴⁰ The defendants seem to suggest that if the NEIF benefits the industry, it benefits the workers in the industry, thereby supplying a valid labor purpose. In *Detroit Resilient Floor Decorators*, cited above, the union made the same contention. It was rejected by the NLRB, however, on the basis that such a claim is speculative at best. Moreover, in arguing to the district court, the defendants position was that the NEIF provision was a concession to management. The issue to be considered in determining whether a given practice falls within the protection of the exemption is whether the practice relates to the wages, hours or working conditions of union members, not whether it furthers an industry. Under the defendants' theory, the beneficiary of their illegal scheme could be a charity such as United Way, which benefits the community and the workers in the community and therefore the union members. This would not, however, advance labor policy, and would not be related to wages or working conditions.

G. The Decisions Below Do Not Conflict With Any Labor Policy Concerning Multiemployer Bargaining

All of the defendants take the position that the Court should grant certiorari because the decisions below conflict with the national policy in favor of multiemployer bargaining. The IBEW defendants argue that the decisions below will have the effect of permitting members of a multiemployer bargaining unit to avoid unwanted obligations in a collective bargaining agreement. *IBEW Petition* at 26-28. The NECA defendants argue that labor law permits the proposal of non-mandatory subjects of bargaining such as the NEIF, and that the decision below conflicts with this principle to the extent that it did not require the plaintiffs to prove coercion on the part of the union. *NECA Petition* at 15-19.

Once again, the conflict posed by the defendant is illusory. Nowhere did either court below ever hold that a union or employer violates the antitrust laws by requesting the inclusion of an industry fund provision in a collective bargaining agreement. What the defendants conveniently ignore over and over again is that the restraint in this case was *not* the IBEW requesting the NEIF provision in collective bargaining agreements; it was the agreement between National NECA and the IBEW that the NEIF surcharge would be placed in "all construction agreements in the electrical industry." The union remains free to request from any employer any non-mandatory item, so long as it acts unilaterally. The Fourth Circuit went to great pains to explain that the injunction did not apply to situations where the union acted alone in requesting a specific item to be included in a collective bargaining agreement. *NECA App.* at 17a-18a.

There is no justification in the nation's labor laws for the agreement made by the defendants. In *United Mine Workers v. Pennington*, 381 U.S. 657, 666 (1965), Justice

White in his opinion for the Court expressly stated that neither labor law nor labor policy supports a union bargaining with one group about what it will seek from another group. Justice White, again writing for the Court in *Federal Maritime Commission v. Pacific Maritime Association*, *supra*, stated that the union went outside the scope of labor law or policy when it agreed with an employers' association to seek various items from employers not represented by the association. 435 U.S. at 62. See also *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164 (1971). To the extent that the instant case forbids a union's participation in a business group's scheme to cause a cost increase in the form of a payment by non-member competitors to the business group, which payment is unrelated to any legitimate union concern, the decisions below comport with existing labor law that the union is not free to negotiate with one employer concerning the terms it will request from another.

IV

CONCLUSION

The facts of this case are not complicated. The Fourth Circuit's decision is straightforward and based on unquestioned precedent. This case does not blaze any new trails with regard to the principle that price fixing is illegal *per se*. Similar to every other price fixing case, it simply applies antitrust principles to the relevant facts. The facts are that about half of the union electrical contractors in this country are members of a trade association which made an agreement with the union under which the union agreed that it would secure for the use of the favored association a designated sum from non-members of the trade association. This sum equals the dues paid to the trade association by its members, thereby equalizing costs among competitors. This is simple, garden variety price fixing, just as surely as the facts in-

volved in every case from *Socony Vacuum to Maricopa County Medical Society* amounted to price fixing. Defendants' Petitions should be denied.

Respectfully submitted,

WILBUR D. PRESTON, JR.

(Counsel of Record)

ROBERT M. WRIGHT

GERSON B. MEHLMAN

JAMES R. CHASON

WHITEFORD, TAYLOR, PRESTON,

TRIMBLE & JOHNSTON

2000 First Maryland Building

25 South Charles Street

Baltimore, MD 21201

(301) 752-0987

ANTHONY J. OBADAL

ALAN D. CIRKER

ZIMMERMAN & OBADAL

1101 15th Street, N.W.

Washington, D.C. 20005

IRA GENBERG

STOKES, SHAPIRO, FUSSELL & GENBERG

2300 First National Bank Tower

Atlanta, GA 30303

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC., *et al.*

Petitioners,

v.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*

Respondents.

**Reply To Respondents' Brief In Opposition To The Petition Of
The National Electrical Contractors Association, Inc.**

EARL W. KINTER
DONALD M. BARNES
DENNIS C. CUNEO
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6044

MILTON HANDLER
STANLEY D. ROBINSON
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

GUY FARMER
(Counsel of Record)
FARMER, MCGUINN, FLOOD,
BECHTEL & WARD
1000 Potomac Street, N.W.
Suite 402
Washington, D.C. 20007
(202) 298-6910
SHALE D. STILLER
PETER H. GUNST
FRANK, BERNSTEIN, CONAWAY
& GOLDMAN
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 547-0500

*Attorneys for Petitioners National Electrical Contractors
Association, Robert L. Higgins and H.E. Autrey and Other
Individuals Sued In Their Individual Capacities and as Trustees
of The National Electrical Industry Fund; Colgan Electric
Company, Inc. and Miller Electric Company
March 15, 1983*

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**Reply To Respondents' Brief In Opposition To The Petition Of
The National Electrical Contractors Association, Inc.**

I

INTRODUCTION

Petitioner National Electrical Contractors Association, Inc. (NECA)¹ and the International Brotherhood of Electrical Workers (IBEW), in separate petitions, requested the Court to review a judgment by the United States Court of Appeals for the Fourth Circuit affirming a summary judgment by the District Court against the employer association and the International Union, IBEW. Miller and Colgan, two individual defendants, also filed a petition on the issue of venue. The Respondents filed Briefs in Opposition to the three petitions.

¹ The corporate listing statement for NECA appearing in its Petition for a Writ of Certiorari (at pages ii-iii) is still current and correct.

II

THE QUESTION RAISED BY NECA'S PETITION FOR
CERTIORARI HAS NOT BEEN ADDRESSED BY
RESPONDENTS

NECA's Petition seeks the Court's review of an important issue of federal law *never before considered by this Court*. That issue is whether it is price fixing *per se* for an employer association and an international union to establish by collective bargaining an industry fund which is binding on NECA members, but is binding on non-NECA electrical contractors only if they voluntarily authorized or adopted the local NECA-IBEW agreements containing the industry fund.

As the District Court for the Eastern District of Virginia specifically found,² and as pointed out by dissenting Judge Hall of the Fourth Circuit in his opinion in this case, *all* electrical contractors derived valuable benefits from the activities sponsored by and paid for out of the industry fund.

In our view, it is crucial in this case that the courts below ruled out any *coercion* and failed to find that any non-NECA member was *forced* or *required* to pay into the fund. Thus, the entire arrangement was voluntary. However, the court below regarded the fact of voluntariness as irrelevant, based upon its astounding reading of the *in pari delicto* holding in *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134 (1968).

² Unpublished memorandum opinion, *C.L. Williams v. ITT Grinnell Industrial Piping, Inc.* (E.D. Va. 1980); see Appendix to our Petition, p. 121a.

III

THE RESPONDENTS' OPPOSITION FAILS TO COME TO GRIPS WITH THE CRUCIAL ISSUES RAISED BY THE PETITIONERS

The Respondents' Brief does not directly address any of the crucial issues raised by our Petition for Certiorari. Rather, the opposition takes random shots at the industry fund without presenting a cohesive analysis of the basic issues or attempting to present legal and factual support for the decision of the court below. Thus, Respondents' Opposition attempts to refute arguments not even made in our Petition and erroneously reframes others to set them up as "straw men" in order to knock them down.

Respondents would have the Court believe that this is an ordinary "garden-variety price fixing" case. But, even both courts below recognized that this is a case of "first impression"—a situation typically unsuited for *per se* treatment. The fallacy of Respondents' characterization of this case as simple garden-variety price fixing with which the courts deal all the time is that nowhere in their brief can Respondents themselves define the "commodity" or "article of commerce," the price of which has been fixed.

It would be a waste of time to attempt to answer all the irrelevancies and distortions in Respondents' Opposition Brief. However, several arguments are so ill-founded that it is necessary to get the record straight on certain salient points.

1. The Opposition Brief does not actually dispute one of the pivotal facts in this case. That fact, admitted by the court below, is that no non-NECA member was *coerced* or *forced* to adopt the local NECA-IBEW agreements containing the industry fund. We believe that this admission by the lower court is fatal to the majority decision

below. Industry funds are lawful permissive subjects of bargaining, and if no one was coerced into adopting the industry fund, the agreement establishing the fund could not possibly violate antitrust law.

Respondents make several statements obliquely touching on this point, but they do not contradict the *basic voluntariness* of the industry fund as applied to non-NECA members. Respondents assert that non-NECA members "have no right to vote" on the collective bargaining agreements of NECA. It is true that only NECA members vote on NECA agreements, but that is totally irrelevant. Non-NECA members, by "letters of assent" voluntarily given, authorized or adopted the agreements for their own benefit and voluntarily made themselves parties to them. Respondents go further and suggest that with two exceptions they are "barred" from NECA membership. The statement is disingenuously misleading because this is a class whose members are restricted to electrical contractors. NECA excludes no electrical contractors and, in fact, Foley and Commonwealth, the class representatives, were former NECA members. The other named plaintiffs are not electrical contractors.

If non-NECA contractors did not wish to adopt the NECA agreements, they were totally free to negotiate their own separate agreements, and some did. Respondents assert that it is "not normal" for non-NECA contractors to negotiate their own agreements, but do not dispute that it was their own free choice to do so. The record is clear on that.

2. Respondents imply that non-NECA members were "obligated" or "required" to pay into the fund. This statement is not true if it is intended to convey the thought that they were obligated or required to pay *ab-*

sent their own consent. Of course, those who gave plenary authority to NECA chapters to negotiate for them became a part of the NECA bargaining units and became obligated to *all* lawful terms of the contracts negotiated by NECA chapters with IBEW locals. Those who signed "assents" to the agreements containing the industry fund after they were negotiated cannot complain that they were coerced. The crucial admitted fact is that no non-NECA contractor was "required" or "obligated" to give its initial plenary bargaining authority to NECA chapters or to sign a letter of assent to the agreement after it was negotiated. The non-NECA contractor who did not wish to adhere to either of these two options had the right to negotiate his own agreement and to reject the industry fund. As a permissive subject of bargaining, the industry fund could not be insisted upon. In fact, Respondents concede that President Pillard of the IBEW instructed all IBEW local construction unions to take the industry fund off the bargaining table if the contractor in negotiations objected to it.

3. Respondents complain that they were not allowed to assent only to *some* parts of a NECA-IBEW agreement, while receiving *all* its benefits. This position would have validity only if the industry fund were an illegal subject of bargaining, which is not the case. Not surprisingly, it was the long-standing policy of the IBEW not to accept a modified assent which would have allowed a contractor to "pick and choose" which provisions to accept. The NLRB reviewed this IBEW conduct and policy and found nothing that violated the National Labor Relations Act or labor policy. If the non-NECA contractor did not like the Agreement, his recourse was to negotiate his *own* separate agreement.

4. Respondents imply that non-NECA members received no benefits from the industry fund. This is contra-

ry to the record evidence, contrary to the holding of the district court in the *Grinnell* case, *supra*, contrary to the finding of dissenting Judge Hall in the lower court, and contrary to the prescribed purposes of the Trust. Moreover, this is a feeble and far-fetched attempt to discredit the *administration* of the fund. However, the finding which we seek to have reviewed has nothing to do with maladministration of the fund. The court below made no such finding. The finding on which we seek review is that *mere establishment* of the fund was price fixing, illegal *per se*.

5. Respondents claim that the decision below does not jeopardize industry funds generally, or interfere with the collective bargaining process. Respondents are clearly trying to play down the far-reaching impact of the decision below to persuade the Court that this case has no national import. The *amici curiae* briefs filed with the Court show the deep concern of other sectors of the construction industry with the destructive impact of the decision below on all industry funds. The construction industry generally views the lower court's decision as a serious threat to the continued existence of industry funds, however it is construed.

Similarly, Respondents assert that the decision of the lower court has no impact on collective bargaining. This is obviously false. The court below condemned as price fixing, illegal *per se*, an unexceptional labor agreement containing a perfectly permissible subject of bargaining, binding only on those who authorized its negotiation or accepted the results of the bargaining, with full knowledge of the inclusion of the industry fund. The effect on collective bargaining is obvious and profound. The impact is sharpened by the direct conflict between the antitrust decision of the court below and the labor policy of the NLRB, which has upheld the validity of the agreement in

question, and specifically the negotiation and implementation of the industry fund.

6. Respondents assert that the amount of industry fund monies spent on labor relations is "extremely small" in relation to total expenditures. This statement reflects a deliberate distortion of the facts. Respondents refer to page 5 of NECA's Petition for Certiorari as support for this statement. First of all, NECA's petition at pages 5 and 6 simply enumerates the industrywide services to be financed from the fund. Six services are listed, four of which deal directly with financing the industry's participation in labor relations. These include negotiating and implementing local and national collective bargaining agreements, maintaining a national arbitration system, implementing employee training programs, and financing NECA's nationwide labor relations services. The bulk of the monies are spent on those endeavors. Moreover, the remaining two trust purposes are also designed to help the *entire* industry. These consist of increasing industry advertising and of improving industry and governmental codes and specifications.³

7. Respondents, without any record support, characterize the industry fund as a "total elimination" of price competition between NECA and non-NECA contractors. The statement could be true only if payment of between .2 to 1% of payroll by non-NECA contractors into an industry fund on the same basis as NECA contractors would eliminate or seriously impact upon price competition. To assert that it does is a long leap from fact to fantasy. The court below made no such finding. Indeed, there is considerable testimony by non-NECA contractors to refute

³ Respondents' uninformed analysis of NECA's budget is wholly inaccurate and has no validity whatsoever.

it. Furthermore, if the case is to turn on the *effect* of the industry fund on price, Petitioners are at least entitled to a trial on the merits under the rule of reason.

8. Respondents assert that "an agreement to equalize the cost of belonging to a trade association is *per se* price fixing in a commercial market" (Brief in Opposition, p. 18). The cost of being a NECA member was never at issue, but the legal proposition asserted is obviously wrong.

9. Obviously, Respondents' assertions that this case has "no relationship to the elimination of free riders" cannot be true. As dissenting Judge Hall pointed out, non-NECA members were receiving a "free ride" on substantial benefits derived from NECA agreements and NECA services. The Respondents cannot be heard to dispute this point. In their Opposition to the Petition for Certiorari filed by Miller Electric and Colgan Electric (No. 82-1143), two of the Defendants in this case, Respondents vigorously argue that the NECA services are numerous, "valuable," and "vital" to the contractors' ability to conduct business (Respondents' Opposition Brief, p. 5, in No. 82-1143).

CONCLUSION

Petitioners' legal arguments and analysis of the facts under prevailing labor and antitrust law and policy are fully discussed in the Petition.

Respectfully submitted,

EARL W. KINTER
DONALD M. BARNES
DENNIS C. CUNEO
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
1050 Connecticut Ave., N.W.
Washington, D.C. 20036-5339
(202) 857-6044
MILTON HANDLER
STANLEY D. ROBINSON
KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022
(212) 759-8400

GUY FARMER
(Counsel of Record)
FARMER, MCGUINN, FLOOD,
BECHTEL & WARD
1000 Potomac Street, N.W.
Suite 402
Washington, D.C. 20007
(202) 298-6910
SHALE D. STILLER
PETER H. GUNST
FRANK, BERNSTEIN, CONAWAY
& GOLDMAN
2 Hopkins Plaza
Baltimore, Maryland 21201
(301) 547-0500

Attorneys for Petitioners National Electrical Contractors Association, Robert L. Higgins and H.E. Autrey and Other Individuals Sued In Their Individual Capacities and as Trustees of The National Electrical Industry Fund; Colgan Electric Company, Inc. and Miller Electric Company

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No. 82-1146

IN THE

Supreme Court of the United States

October Term, 1982

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION,
INC., *et al.*,

Petitioners,

vs.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the
U.S. Court of Appeals for the Fourth Circuit.

**MOTION OF THE FUND FOR CONSTRUCTION
INDUSTRY ADVANCEMENT, CONSTRUCTION
INDUSTRY ADVANCEMENT FUND OF
SOUTHERN CALIFORNIA, AND THE SAN
DIEGO CONSTRUCTION INDUSTRY
ADVANCEMENT FUND TO FILE BRIEF AS AMICI
CURIAE; BRIEF OF AMICI CURIAE IN
SUPPORT OF PETITION FOR WRIT OF
CERTIORARI.**

JAMES P. WATSON,*
GEORGE M. COX,
COX, CASTLE & NICHOLSON,
2049 Century Park East,
28th Floor,
Los Angeles, Calif. 90067,
(213) 277-4222,

Attorneys for Amici Curiae.

**Counsel of Record.*

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No. 82-1146

IN THE

Supreme Court of the United States

October Term, 1982

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION,
INC., *et al.*,

Petitioners,

vs.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,

Respondents.

**MOTION OF THE FUND FOR CONSTRUCTION IN-
DUSTRY ADVANCEMENT, CONSTRUCTION
INDUSTRY ADVANCEMENT FUND OF SOUTH-
ERN CALIFORNIA AND THE SAN DIEGO CON-
STRUCTION INDUSTRY ADVANCEMENT FUND
TO FILE BRIEF AS AMICI CURIAE.**

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

The Fund for Construction Industry Advancement ("FCIA"), the Construction Industry Advancement Fund of Southern California ("CIAF"), and the San Diego Construction Industry Advancement Fund ("SDCIAF") hereby move the Court, pursuant to Supreme Court Rule 36.1, for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari filed on January 7, 1983 in USSC No. 82-1146.

In support of this motion, FCIA, CIAF and SDCIAF state as follows:

1. This motion is necessitated by the failure, upon request, of Respondents National Constructors Association, *et al.*, to give written consent to the filing of a brief by the amici applicants herein. Petitioners National Electrical Contractors Association, *et al.* have consented to the filing of the accompanying brief. Their letter of consent has previously been filed with the Clerk of the Court.

2. FCIA is an industry advancement fund established in 1977 to promote the interests of those who participate in the construction industry. FCIA has approximately 4,000 actively contributing employer members. Its contributions for 1980 totalled approximately \$870,000.00; its contributions for 1981 totalled approximately \$1,160,000.00.

3. CIAF is an industry advancement fund established in 1972 to further the interests of those who participate in the construction industry. There are approximately 3,000 active contributors to CIAF. In 1980, their total contributions were approximately \$713,000.00. In 1981, their total contributions were approximately \$764,000.00.

4. SDCIAF is an industry advancement fund established in 1972 to promote the interests of those who participate in the construction industry. SDCIAF presently has approximately 900 members. SDCIAF received contributions in 1980 in excess of \$500,000.00, and in 1981 in excess of \$600,000.00.

5. The members of CIAF, FCIA and SDCIAF have an ongoing interest in the prosperity and well-being of the construction industry, and the preservation of competitive conditions in that industry. Though not created, operated and administered in the same manner as the industry ad-

vancement fund which is the focus of the present action,¹ they share a concern that such industry funds, created to preserve competitive conditions in the industry, not become a target for unnecessary antitrust litigation. They believe the holding of the Fourth Circuit Court of Appeals in this case is incorrect, and deserves review and reversal by this Court. Specifically, they believe the Fourth Circuit Court of Appeals has misapplied fundamental principles of antitrust law developed by this Court and has improperly applied a "per se" rule of antitrust liability to a hitherto unexamined contractual provision, without the benefit of trial on the significant issues of fact raised by the Petitioners.

They further believe that the sweeping language used by the Fourth Circuit Court of Appeals was unnecessary to its decision, and that it will provoke additional, unmeritorious antitrust litigation outside the context of the present case. They believe the decision of the Fourth Circuit Court of Appeals could be read to mean that any provision of a collective bargaining agreement not immediately concerned with wages, hours and working conditions constitutes illegal "price fixing" if it has any effect whatsoever upon the market price of goods and/or services. Such a rule would expose numerous provisions in thousands of collective bargaining agreements to antitrust scrutiny.

The amici are in a unique position to advise the Court because of their intimate familiarity with collective bargaining conditions in the construction industry.

¹Specifically, CIAF, FCIA and SDCIAF do not finance collective bargaining functions.

WHEREFORE, it is respectfully moved and requested that CIAF, FCIA and SDCIAF be granted leave to file the accompanying brief as amici curiae.

Dated: February 17, 1983.

Respectfully submitted,

JAMES P. WATSON*,

GEORGE M. COX,

COX, CASTLE & NICHOLSON,

Attorneys for Amici Curiae.

**Counsel of Record.*

No. 82-1146
IN THE
Supreme Court of the United States

October Term, 1982

NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION,
INC., *et al.*,

Petitioners,

vs.

NATIONAL CONSTRUCTORS ASSOCIATION, *et al.*,

Respondents.

BRIEF OF AMICI CURIAE FUND FOR CONSTRUCTION INDUSTRY ADVANCEMENT, CONSTRUCTION INDUSTRY ADVANCEMENT FUND OF SOUTHERN CALIFORNIA AND SAN DIEGO CONSTRUCTION INDUSTRY ADVANCEMENT FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

The Fund for Construction Industry Advancement, Construction Industry Advancement Fund of Southern California, and the San Diego Construction Industry Advancement Fund (the "Funds") hereby submit this brief in support of the Petition for Writ of Certiorari in No. 82-1146.

I.

INTEREST OF THE AMICI CURIAE.

A statement describing the Funds and their interest in this case is set forth in the preceding motion requesting leave to file this brief as amici curiae.

II.

SUMMARY OF ARGUMENT.

1. The Fourth Circuit Court of Appeals erred in applying a *per se* price fixing analysis to the facts of this case. While conceding that the present case is unique,¹ the Fourth Circuit has ignored this Court's prior warnings against using *per se* rules in areas of antitrust inquiry which have not yet been fully explored by the courts. The Fourth Circuit Court of Appeals also disregarded the long line of authorities from this Court and other courts which have tested alleged restraints of trade arising in the collective bargaining context under a "rule of reason" analysis, rather than through the application of *per se* rules designed to deal with traditional restraints of trade arising in a commercial context.

2. The Fourth Circuit Court of Appeals and the district court below erroneously resolved disputed issues of fact without the benefit of a trial, in contravention of the explicit provisions of the Federal Rules of Civil Procedure and controlling principles of federal case law. It was clear error for the courts below to permit this case to go to judgment without a full trial on the disputed issues of fact.

III.

STATEMENT OF FACTS.

The critical issues in this case turn on the interpretation of Article 6 of a national collective bargaining agreement ("the agreement") entered into in 1976 between the Na-

¹The Fourth Circuit's opinion admits that "On its particular facts, this is a case of first impression and as such we should be careful in applying the *per se* rule." *National Electrical Contractors Association, Inc. v. National Constructors Association* (4th Cir. 1982), 678 F.2d 492, 503, n.14, citing *Broadcast Music, Inc. v. CBS* (1979), 441 U.S. 1, 99 S.Ct. 1551, 1557. The opinion of the Fourth Circuit Court of Appeals is hereinafter cited, for brevity, as "*Cir. Ct. Op.*" The opinion of the U.S. District Court in *National Constructors Association, et al. v. National Electrical Association, Inc., et al.* (D. Md. 1980), 498 F.Supp. 510, is hereinafter cited, for brevity, as "*Dist. Ct. Op.*"

tional Electrical Contractors Association ("NECA") and the International Brotherhood of Electrical Workers ("IBEW"), which provided for the establishment of the National Electrical Industry Fund ("NEIF"). Article 6 states, in pertinent part:

"The parties agree to the establishment of a legally constituted trust to be called the National Electrical Industry Fund.

"All construction agreements in the electrical industry shall contain the following language:

"Each individual employer shall contribute one percent (1%)* of the gross labor payroll to be forwarded monthly to the National Electrical Industry Fund in a form and manner prescribed by the Trustees no later than fifteen (15) calendar days following the last day of the month in which the labor was performed. Failure to do so will be considered a breach of this agreement on the part of the individual employer." *(An amount not to exceed 1% nor less than 0.2 of 1% as determined by each local chapter [of NECA] and approved by the Trustees.

The plaintiffs National Constructors Association, *et al.* (collectively "NCA"), Respondents herein, charge that the promulgation and implementation of this agreement constituted price fixing *per se* violative of §1 of the Sherman Act, 15 U.S.C. §1.

Though there were serious questions raised by the Petitioners about the interpretation of Article 6 of the agreement, and the economic effect such an agreement would have, the District Court and the Fourth Circuit Court of Appeals elected to dispose of the case on a "paper record," without benefit of trial. Because the acts of the Petitioners were deemed to be *per se* violations of the antitrust laws, neither Court believed it necessary to conduct any inquiry into the

actual economic effect of the challenged agreement, nor to determine, how, in fact, the agreement was actually interpreted and implemented. *Dist. Ct. Op.*, 498 F.Supp. at 537; *Cir. Ct. Op.*, 678 F.2d at 501.

IV.

REASONS THE PETITION SHOULD BE GRANTED.

A. The Fourth Circuit Incorrectly Applied the "Per Se" Rule Against Price Fixing to a Hitherto Unexamined Contractual Relationship, With Unknown Market Effects.

1. The Sherman Act Does Not Condemn All Restraints of Trade, nor All Agreements Which May "Fix" Prices.

Though the Sherman Act purports to condemn every contract or combination "in restraint of trade or commerce," it has long been recognized that only those restraints which have an actual effect upon commercial competition and/or which adversely affect the rights of consumers are within its purview. *See, e.g., Apex Hosiery Co. v. Leader* (1940), 310 U.S. 469, 60 S.Ct. 982; *Blue Shield of Virginia v. McCready* (1982), ___ U.S. ___, 102 S.Ct. 2540. Many types of "restraints" have been found to lie outside the scope of the Sherman Act, because they lack the required nexus with commercial competition. *See, e.g., Hunt v. Crumboch* (1945), 325 U.S. 821, 65 S.Ct. 1545; *State of Missouri v. National Organization For Women, Inc.* (8th Cir. 1980), 620 F.2d 1301, *cert. denied*, (1981) 449 U.S. 842, 101 S.Ct. 122.

The inquiry is not ended, however, by determining that a particular restraint is within the scope of the Sherman Act. Once it is clear that a given restraint is of the type to which the Act is to be applied, the court must determine whether it is a *per se* violation of the Act, or is to be analyzed under the "rule of reason." The determination that a particular

anticompetitive act is a *per se* violation of the Sherman Act is limited to those instances in which the courts have sufficient prior experience with the restraint to insure that it does, in fact, have the pernicious anticompetitive effects at which the Sherman Act was aimed:

“It is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . .” *United States v. Topco Associates, Inc.* (1972), 405 U.S. 596, 607-608, 92 S.Ct. 1126, 1133; *quoted with approval in Broadcast Music Co., Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1, 9, 99 S.Ct. 1551, 1557.

The courts have consistently applied the *per se* rule to restraints which they find to constitute “price fixing.” However, not every agreement which literally “fixes” prices is illegal; see *Broadcast Music Co., Inc. v. Columbia Broadcasting System* (1979), 441 U.S. 1, 99 S.Ct. 1551; *Appalachian Coals, Inc. v. United States* (1933), 288 U.S. 344, 53 S.Ct. 471.

“As generally used in the antitrust field, ‘price fixing’ is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable . . . literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally ‘price fixing’ but they are not ‘*per se*’ in violation of the Sherman Act . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label ‘*per se* price fixing.’ That will often, but not always, be a simple matter.” *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (1979), 441 U.S. 1, 9, 99 S.Ct. 1551, 1557.

Earlier decisions of this Court also support the view that “price fixing” is not always *per se* illegal.

In *Board of Trade of Chicago v. United States*, 246 U.S. 231, 38 S.Ct. 497 (1918), this Court refused to condemn a rule which "fixed" prices for the after-hours trading of commodities by a commodity exchange. This Court found that the principal purpose of the agreement was to reasonably regulate hours of trading; the "fixing" of prices was ancillary to the otherwise lawful purpose. Similarly, in *Appalachian Coals, Inc. v. U.S.*, 288 U.S. 344, 53 S.Ct. 471 (1933), this Court refused to find that the creation of a corporation by 137 producers of coal, to act as their joint selling agent to market coal at uniform prices, was unlawful price fixing. The Court noted that the bituminous coal industry was in a depressed condition, and that such a joint selling arrangement, though it might "fix" prices, would operate to preserve the industry and create an orderly market place.

No party to this litigation appears to dispute the fact that the conduct condemned by the courts below does not readily fit within any of the classic "price fixing" patterns. Yet neither court was hesitant to apply the *per se* rule against price fixing to the unique facts of this case.

This Court recently held that "[p]er se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977), 433 U.S. 36, 49-50, 97 S.Ct. 2549, 2558.² (Emphasis supplied.) Amici believe the Fourth Cir-

²Lower courts have also recognized that *per se* rules are to be applied with caution:

"A court will not indulge in this conclusive presumption lightly. Invocation of a *per se* rule always risks sweeping reasonable, pro-competitive activity within a general condemnation, and a court will run this risk only when it can say, on the strength of unambiguous experience, that the challenged action is a 'naked restraint of trade with no purpose except stifling of competition.'" *Smith v. Pro Football, Inc.* (D.C. Cir. 1978), 593 F.2d 1173, 1181, quoting *White Motor Co. v. United States* (1963), 372 U.S. 253, 263, 83 S.Ct. 696."

cuit and the trial court ignored this fundamental principle in applying a *per se* rule to the facts of the present case.

As we discuss in detail, *infra*, it is far from clear that the agreement at issue in this case has any "anticompetitive" effects.

2. The Agreement at Issue in This Case Is Not a "Price Fixing" Agreement.

Amici recognize, as did the courts below, that "price fixing" may be accomplished by means other than the literal setting of prices; *see, e.g., United States v. General Motors Corp.* (1966), 384 U.S. 127, 86 U.S. 1321; *Catalano, Inc. v. Target Sales, Inc.* (1980), 446 U.S. 643, 100 S.Ct. 1925. The critical question is whether there is a direct restraint upon price competition. *See United States v. General Motors, supra; United States v. Parke Davis & Co.* (1960), 362 U.S. 29, 80 S.Ct. 503.

The Fourth Circuit Court of Appeals and the trial court below decided that the requisite effect upon price competition was self-evident in this case, and that the *per se* rule against price fixing should be applied without inquiry into the actual economic effect of the challenged restraint. *Cir. Ct. Op.*, 678 F.2d at 501. This is a startling and unsupportable position. The facts of this case, at least on the "paper record" before the Court, do not demonstrate clear damage to price competition. No contractor's bids are fixed, nor is any component of any contractor's bid fixed. The only effect which the challenged agreement has on price competition is to cause a contractor's gross labor costs to

be one percent higher than they otherwise would be.³ The contractor's gross labor costs remain a function of the contractor's own decisions about labor staffing on its projects. Moreover, there is no demonstrable direct relationship between a contractor's gross labor cost and the contractor's total bid price. The bid price will necessarily include the contractor's estimated profit, a figure which may vary widely, depending upon the intensity of competition for the work sought, the financial risk involved in bidding on the work, and the amount of the contractor's resources which will be required to perform the work, if a contract is awarded. It is far from certain that the dollar amount of any specific bid will be affected by the imposition of the obligation to contribute to the NEIF.

The plaintiffs contend that construction consumers will be denied the benefit of lower bids on construction work as a result of the NEIF contribution obligation. It is simply not clear that this is so. If contractors who currently have no obligation to contribute to the NEIF have been enjoying higher profit margins on their work as a result, they may elect to absorb the extra cost of contributing to the NEIF, and lower their profit margins accordingly. There would be no net effect on price to the construction consumer.

This Court has previously rejected the claims of antitrust plaintiffs who assert that they were damaged by charges "passed on" by an intermediary; see *Illinois Brick Co. v.*

³The mere fact that one component of a total price has been affected does not mean that illegal price fixing has occurred. For example, in *General Cinema Corp. v. Buena Vista Distribution Co.* (9th Cir. 1982), 681 F.2d 594, a federal appellate court rejected the contention that a film distributor had engaged in price fixing by requiring exhibitors to pay, as film rental, a stated percentage of the price of each ticket sold or a "minimum per capita amount." Though these practices had a clear and direct effect on the price the exhibitor would charge for tickets, the Court found that the rental scheme was not an illegal attempt to fix prices.

Illinois, (1977) 431 U.S. 720, 97 S.Ct. 2061. This Court's opinion in *Illinois Brick*, and its earlier decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* (1968), 392 U.S. 481, 88 S.Ct. 2224, specifically note the severe evidentiary problems which are created when one assumes that charges levied upon one party have any direct effect upon that party's subsequent dealings with another. The Court's reasoning in *Illinois Brick* highlights the critical reason why the economic analysis employed by the Fourth Circuit in this case should be rejected.

In any event, it seems obvious that no reasonable court could reach a conclusion about the impact which the challenged agreement would have on price competition, absent an inquiry into its actual market effect.⁴ For this reason, imposition of the *per se* rule seems completely inappropriate.

3. The Challenged "Price Fixing" Provision Is Ancillary to an Otherwise Lawful Agreement With Pro-Competitive Purposes.

This Court has long recognized that some contractual provisions, which may literally "fix" prices, nevertheless do not violate the antitrust laws, because they are ancillary to the legitimate purpose of an otherwise lawful agreement.

For example, in *Appalachian Coals, Inc. v. United States* (1933), 288 U.S. 344, 53 S.Ct. 471, this Court refused to

⁴Amici recognize that this Court has recently reaffirmed the application of the *per se* rule against price fixing in *Arizona v. Maricopa County Medical Society*, ___ U.S. ___, 102 S.Ct. 2466 (1982). This Court's decision in *Arizona* is not dispositive of the issues raised in this case, however. In *Arizona*, there was no serious question that the challenged practices did, in fact, "fix" some prices. For the reasons already noted, it is far from clear that the payments made to the NEIF have any significant effect upon price competition. Moreover, the *Arizona* case arose outside the collective bargaining context, so the Court was not faced with the resolution of potentially conflicting policies embodied in the federal and antitrust laws. See discussion, *infra*.

sustain a challenge to a combination of coal producers, who had agreed, through uniform contracts, to appoint one entity as a common selling agent, with power to control the price at which the producers' coal was sold. While recognizing the effect which the challenged combination would have on market prices, the Court held that the price-fixing provisions were merely ancillary to the purpose of the agreement. This Court noted:

"A cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities." 53 S.Ct. at 479.

Here, as in the *Appalachian Coals* case, the "price fixing" aspect of the agreement is merely ancillary to an otherwise legal agreement with pro-competitive purposes.⁵

As the dissent below recognized, the purpose of the NEIF was to eliminate the "free ride" enjoyed by contractors who garner the benefits of NECA's labor negotiations and dispute resolution mechanisms, but which bear no part of the cost thereof.

Numerous courts have recognized that the elimination of "free riders," who attempt to take advantage of services

⁵Professor Sullivan has noted that certain types of activity which affect price are not appropriate subjects for *per se* analysis:

"Suppose, for example, that the purpose and effect of a particular arrangement is to make a better market through the establishment of an organized exchange where all buyers and sellers operate, by standardizing the products to facilitate price comparisons, or by exchanging information in ways facilitating competition. These kinds of practices would affect price, but on our assumptions they would do so by making it more competitive; therefore, they ought not to be treated as *per se* invalid." Sullivan, *Handbook of the Law of Antitrust*, §74, p. 200 (West, 1977).

financed by their competitors, is a legitimate goal not violative of antitrust laws; see, e.g., *Com-Tel, Inc. v. Dukane Corp.* (6th Cir. 1982), 669 F.2d 404, 410; *Davis-Watkins Co. v. Service Merchandise* (6th Cir. 1982), 686 F.2d 1190, 1199-1200; *U.S. Trotting Association v. Chicago Downs Association, Inc.* (7th Cir. 1981), 665 F.2d 781, 789.

If all electrical industry contractors adopted the posture of Respondents, there would be no coherent pattern of collective bargaining and dispute resolution in the unionized electrical contracting industry. The opinions of the courts below do not suggest that the Petitioners were motivated by a desire to fix consumer prices or market shares, or to deprive consumers of the opportunity to obtain fully competitive bidding on their electrical construction projects.⁶

The Fourth Circuit suggests, incorrectly, that the effect of the agreement will be to "stabilize prices of NECA and non-NECA contractors." *Cir. Ct. Op.*, 678 F.2d at 501. In fact, the challenged agreement does not stabilize prices at all. It merely insures that similarly situated contractors will compete for electrical contracting work from a similar cost base, by eliminating the "free ride" that non-NECA contractors have enjoyed. There is no reason to suppose that this arrangement will cause the contractors to compete any less vigorously, in terms of price, for the available construction work.

Numerous lower court decisions have adhered to the recognized principle that provisions which fix or affect prices

⁶Amici recognize, of course, that a benevolent motive will not save an otherwise unlawful restraint. However, as this Court recognized in *Appalachian Coals, supra*, the motive underlying a challenged restraint may play a role in determining whether it is violative of the antitrust laws. "With respect to defendant's purposes . . . good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences." *Appalachian Coals, supra*, 288 U.S. at 372, 53 S.Ct. at 478.

are not violative of the Sherman Act, where such provisions are ancillary to otherwise proper agreements; *see, e.g., Evans v. S.S. Kresge Company* (3d Cir. 1976), 544 F.2d 1184, 1190-93, *cert. denied*, (1977) 433 U.S. 908, 97 S.Ct. 1596 [department store owner's agreement with food store operator to require food store to sell products at specified prices was not a *per se* violation of the Sherman Act]; *Kestenbaum v. Falstaff Brewing Corp.* (5th Cir. 1975), 514 F.2d 690, *cert. denied*, (1976) 424 U.S. 943, 96 S.Ct. 1412 [brewer's restriction of the sales price of one of its distributorship franchises was not a *per se* violation of federal antitrust law]; *Sun Oil Company v. Vickers Refining Co.* (8th Cir. 1969), 414 F.2d 383 [agreement between petroleum supplier and distributor that distributor's price "will be no lower than the prices to branded jobbers of one or more of Vicker's principal competitors," did not constitute price fixing *per se* violative of the Sherman Act]; *Checker Motor Corp. v. Chrysler Corp.* (2d Cir. 1969), 405 F.2d 319, *cert. denied*, (1969) 394 U.S. 799, 89 U.S. 1595 [cash rebate paid by Chrysler to purchasers of Chrysler taxicabs from dealers was not *per se* violative of federal antitrust law]; *Denison Mattress Factory v. Spring-Air Co.* (5th Cir. 1962), 308 F.2d 403 [agreement between trademark owner and small manufacturers of mattresses under which manufacturers agreed not to discount prices of mattresses was not *per se* violative of antitrust laws]; *United States v. Columbia Pictures Corp.* (S.D.N.Y. 1960), 189 F.Supp. 153, 178 [arrangement affecting price which is "subservient or ancillary to a transaction which is itself legitimate" should not be analyzed under the *per se* rule].

In this case, it is clear that any "price fixing" effect is ancillary to a perfectly legitimate, pro-competitive purpose: distributing the costs of an extensive (and expensive) labor

relations program among all contractors who enjoy its benefits.

Moreover, even if the activities and purposes of the NEIF were to be considered anticompetitive in purpose or effect, the Fourth Circuit's opinion should not be permitted to stand. In extremely broad and imprecise language, the Fourth Circuit suggests that *any* provision of a collective bargaining agreement which is not sheltered by the non-statutory labor exemption and which may directly affect the price of goods and services, may be a *per se* violation of the Sherman Act. This is so, according to the reasoning of the Fourth Circuit, even though a challenged provision may be a permissible subject of collective bargaining. Such expansive dicta needlessly invites antitrust challenges to many different subjects of collective bargaining. Such challenges might be of limited concern if the collective bargaining parties were certain that the courts would apply the rule of reason to analyze antitrust claims of this type. But the approach adopted by the Fourth Circuit suggests that such collective bargaining parties, like the defendants in this case, might never have a chance to explain the reasons a particular provision was adopted. If a given practice can be "tagged" as price fixing, as a group boycott, or as some other *per se* violation of the Sherman Act, no factual inquiry will be permitted.

Such a doctrine will necessarily have a chilling effect upon the ability of collective bargaining parties to negotiate equitable agreements.

4. This Court and the Lower Courts Have Avoided the Application of Per Se Rules to Alleged Anticompetitive Restraints Arising in the Collective Bargaining Context.

This Court has long recognized the existence of a limited, "non-statutory" antitrust exemption for agreements relating to wages, hours and working conditions reached by parties

within a collective bargaining context; see, e.g., *Connell Construction Co. v. Plumbers & Steamfitters Local No. 100*, 421 U.S. 616, 95 S.Ct. 1830 (1975); *Amalgamated Meatcutters v. Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596 (1965). The courts below found the non-statutory exemption to be inapplicable to the present case, because the challenged agreement does not directly concern itself with wages, hours and working conditions.⁷

Each of the lower courts then proceeded to analyze paragraph 6 of the NECA-IBEW agreement, utilizing traditional antitrust rules developed in the general commercial context, without consideration of the special concerns which underlie a collective bargaining relationship.

This Court, and the majority of lower courts, have avoided the use of "rules of thumb" developed in commercial antitrust cases to claims arising in a collective bargaining context. For example, in *Connell, supra*, this Court remanded to the lower court for a determination of whether a union-employer agreement, found to be outside the non-statutory antitrust exemption, was violative of the Sherman Act. If this Court believed a *per se* approach was appropriate, surely it would have decided the issue, as the Fourth Circuit did here, on the "paper record" before it.

The majority of lower courts have *also* followed a "rule of reason" approach to analyzing restraints created through collective bargaining; see, e.g., *Larry V. Muko, Inc. v.*

⁷The question of whether an agreement falls within the statutory or non-statutory exemption from the antitrust laws is, of course, analytically distinct from the question of whether the agreement constitutes an antitrust violation. See *Larry V. Muko, Inc. v. South Western Pennsylvania Building Construction Trades Council*, 670 F.2d 421, 426 (3d Cir. 1982), *cert. denied*, (1982) — U.S. —, 102 S.Ct. 2294; *Smitty Baker Coal Company, Inc. v. United Mine Workers of America*, 620 F.2d 416, 426, n.25 (4th Cir. 1980), *cert. denied*, (1980) 449 U.S. 870, 101 S.Ct. 207.

Southwestern Pennsylvania & Building Construction Trades Council (3d Cir. 1982), 670 F.2d 421 *cert. denied*, (1982) — U.S. —, 102 S.Ct. 2294; *Ackerman-Chillingworth v. Pacific Electrical Contractors Assn.* (9th Cir. 1978), 579 F.2d 484, 490 *cert. denied*, (1978) 438 U.S. 1089, 99 S.Ct. 872; *Berman Enterprises, Inc. v. Local 333, International Longshoremen's Assn.* (2d Cir. 1981), 644 F.2d 930, 936.⁸

In *Smitty Baker Coal Co. v. United Mine Workers of America*, 620 F.2d 416 (4th Cir. 1980), *cert denied*, 449 U.S. 870, 101 S.Ct. 207 (1980), the Fourth Circuit held that a protective wage clause entered into by a union and a multi-employer bargaining unit, which required the union to demand the same wage scale from all employers who were *not* members of the multi-employer bargaining unit, did not constitute a *per se* violation of the Sherman Act. The Court found that such an agreement would violate the Sherman Act only if the agreement was "rooted in an anticompetitive purpose." 620 F.2d at 431.

The trial court avoided the application of *Smitty Baker* in this case by finding that its holding was limited to cases in which wages were the subject of the agreement. While it may be conceded that the agreement challenged here does not *directly* concern wages, the concern which motivated the collective bargaining parties is identical to that of the parties in *Smitty Baker*, and the economic effect on market prices is far less.

The *per se* rule adopted by the Fourth Circuit, like that disapproved by this Court in the *Broadcast Music* decision,

⁸Professor Handler has suggested that union-employer conduct "should be measured by the rule of reason in recognition of the peculiar labor relations context in which the restraint arises even if, in a non-labor context, similar conduct might be *per se* unlawful." Handler and Zifchak, *Collective Bargaining and the Antitrust Laws: The Emasculation of the Labor Exemption*, 81 Col.L.Rev. 459, 511 (1981).

would be unruly in application. The holding of the Fourth Circuit could be read to mean that *any* provision of a collective bargaining agreement which had a demonstrable effect upon price competition would constitute price fixing *per se* violative of the Sherman Act, unless it is within the protection of the non-statutory exemption. This would leave no room whatsoever for the application of the "rule of reason" to the provisions of collective bargaining agreements, a result surely not supported by the prior decisions of this Court.

B. The Lower Courts Ignored Fundamental Principles of Federal Law Governing the Grant of Summary Judgment.

The most startling feature of the decision of the Fourth Circuit Court of Appeals is its affirmance of summary judgment in a case involving hotly disputed questions of credibility and contract interpretation. Amici believe that the Fourth Circuit has disregarded the fundamental requirements of Rule 56 of the Federal Rules of Civil Procedure, as well as accepted principles of federal case law, in approving the grant of summary judgment in a case such as this.⁹

Though there are many facts which were not in dispute in the trial court, the opinion of the trial court clearly shows that conflicting evidence was offered with regard to the

⁹Amici are aware that cross-motions for summary judgment were filed in the District Court. The fact that Petitioners were seeking summary judgment as to their legal claims and defenses does not detract from the impropriety of granting summary judgment to the Respondents, given the complex factual matrix of this case.

The filing of cross-motions for summary judgment does not prevent the losing party from contending on appeal that there is a dispute as to material facts. See *U.S. Trotting Association v. Chicago Downs Association, Inc.*, (7th Cir. 1981) 665 F.2d 781, 785; *Case & Co., Inc. v. Board of Trade of City of Chicago*, (7th Cir. 1975) 523 F.2d 355, 360.

interpretation of paragraph 6 of the IBEW-NECA agreement, and its application. The District Court believed it was unnecessary to hold a trial to resolve these factual disputes, since it found that the evidence proffered by the defendants was less credible than that offered by the plaintiffs. *Dist. Ct. Op.*, 498 F.Supp. at 529-531. Such credibility determinations cannot properly be made without a trial on the merits.

Moreover, the very question giving rise to the application of the *per se* rule, *i.e.*, whether the imposition of an obligation to contribute to the NEIF would have a direct effect on price competition, was the subject of both factual and legal dispute. For some reason, neither the District Court nor the Fourth Circuit had any difficulty in forecasting the economic effect of paragraph 6, even though there had been no trial on the issue of how such a provision would actually affect market prices. *Dist. Ct. Op.*, 498 F.Supp. at 535-536; *Cir. Ct. Op.*, 678 F.2d at 501.

Furthermore, the defendants were not given the opportunity to demonstrate, by oral testimony, the existence of legitimate and pro-competitive purposes which would be served by the imposition of such a provision.

FRCP 56(c) permits the grant of summary judgment by a district court *only* when the submitted evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

One leading commentator has noted that antitrust actions "are by their very nature poorly suited for disposition by summary judgment." 10A Wright, Miller & Kane, *Federal Practice & Procedure*: Civil 2d §2732.1, noting Justice Clark's statement in *Poller v. Columbia Broadcasting Sys-*

tem, Inc. (1962), 368 U.S. 464, 473, 82 S.Ct. 486, 491 that "Trial by affidavit is no substitute for trial by jury."

It makes no difference that the District Court might believe, upon reviewing the documentary evidence, that plaintiffs' evidence was entitled to more credibility than that of the defendants. That issue is reserved to the trier of fact:

"The burden on the nonmoving party is not a heavy one; he simply is required to show facts, as opposed to general allegations, that present a genuine issue worthy of trial." 10A Miller, Wright & Kane, *Federal Practice & Procedure*, §2727, p. 148 (West 1983); see also *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457 (7th Cir. 1981).

On a motion for summary judgment, the burden of proof is always on the moving party, and all doubts must be resolved against the moving party; see *Adickes v. S.H. Kress & Co.* (1970), 398 U.S. 144, 157, 90 S.Ct. 1598, 1608. In the present case, it appears that the District Court found issues of credibility in the record, but elected to resolve those questions in favor of the *moving* party, simply because it believed that the evidence proffered by the defendants was (1) prepared at a time remote from the matters in issue; and (2) was internally contradictory and/or self-serving. *Dist. Ct. Op.*, 498 F.Supp. at 531. However accurate these observations of a paper record may be, they do not substitute for the observation of live witnesses at trial, nor do they allow the defendants their right, under recognized principles of due process, to a full trial on the merits.

On appellate review, the record must be read in the light most favorable to the party opposing the motion for summary judgment; see *Poller v. Columbia Broadcasting System, Inc.* (1962), 368 U.S. 464, 473, 82 S.Ct. 486, 491. Here, it appears that the Fourth Circuit adopted the same approach as the District Court, resolving issues going to the

weight and credibility of evidence in favor of Respondents.
Cir. Ct. Op., 678 F.2d at 500-502.

Moreover, this is a case involving important issues of public policy not previously examined. The lower courts have recognized that such cases are not suited to disposition by summary judgment, particularly where they involve the intersection of potentially conflicting federal labor and antitrust policies; see, e.g., *Carroll v. American Federation of Musicians of U.S. and Canada* (D.C.N.Y. 1964), 35 FRD 535, 539: "Issues of this importance should not be decided on summary judgment where, while the underlying facts may not be disputed, the inferences and findings necessary to resolve the case are in substantial dispute." See also *Sweetlen v. Wagoner Gas & Oil, Inc.* (D.C. Pa. 1974) 369 F. Supp. 893 [issues of material fact precluded determination, on summary judgment, as to whether an agreement between a petroleum producer and a jobber constituted retail price fixing].

The Court should grant certiorari to vindicate the right of the defendants to a full trial on the controversial and novel issues of law and fact which are raised in the present case.

V.
CONCLUSION.

For the reasons set forth herein, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES P. WATSON,*

GEORGE M. COX,

COX, CASTLE & NICHOLSON,

Attorneys for Amici Curiae.

**Counsel of Record.*